Docket for 04-5286

(7)

No. 04-5286
Title: Michael Donald Dodd, Petitioner
v.
United States
Docketed: July 21, 2004
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (02-16134)
Decision Date: April 16, 2004
Questions Presented

| ~~Date~~ | ~~~~~~~Proceedings and Orders~~~~~~~

(9)

No: 04-5236

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUL 14 2004
OFFICE OF THE CLERK

OCTOBER TERM, 2003

MICHAEL DONALD DODD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Michael Donald Dodd, pursuant to SUP CT. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis*.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon RULE 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

KATHLEEN M. WILLIAMS
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Fort Lauderdale, Florida
July 14 , 2004

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(10)

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On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A federal prisoner may file a motion to vacate sentence under 28 U.S.C. § 2255 ¶ 6(3) within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." State prisoners may do the same under nearly identical language found in 28 U.S.C. § 2244(d)(1)(C).

The Question Presented is:

Does the one-year limitations period in 28 U.S.C. § 2255 ¶ 6(3) begin to run (i) when either the Court or the controlling circuit court has held that the relevant right applies retroactively to cases on collateral review (as the Third, Fourth, Sixth, Seventh, and Ninth Circuits hold), or instead (ii) when the Court recognizes a new right, whether or not it is made retroactively applicable to cases on collateral review (as the Fifth and Eleventh Circuits hold, and the Second and Eighth Circuits have stated in *dicta*)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

No:

MICHAEL DONALD DODD,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Donald Dodd respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 02-16134 in that court on April 16, 2004, *Michael Donald Dodd v. United States*, 365 F.3d 1273 (11th Cir. 2004).

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Eleventh Circuit, *Michael Donald Dodd v. United States*, 365 F.3d 1273 (11th Cir. 2004)), is reproduced in Appendix A-1. The final judgment of the United States District Court is unpublished and is

reproduced in Appendix A-2. The report and recommendation of the United States Magistrate Judge is unpublished and is reproduced in Appendix A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on April 16, 2004. This petition is timely filed under Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISIONS

Title 28, U.S.C. § 2255 ¶6

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of – • • •

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; • • •

Title 28, U.S.C. § 2244(d)(1)(C)

A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of – • • •

(3) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; • • •

STATEMENT OF THE CASE

In June 1999, this Court decided in *Richardson v. United States*, 526 U.S. 813, 119 S. Ct. 1707, 143 L.Ed.2d 985 (1999), that where a criminal defendant is charged under 21 U.S.C. § 848 with being engaged in a continuing criminal enterprise ("CCE"), the jury must unanimously agree not only that the defendant engaged in a continuing series of violations, but also that the defendant committed each of the individual violations necessary to make up a continuing series. However, in 1995, when a jury convicted Petitioner Michael Dodd of a CCE violation, it did not unanimously find that he committed each of the individual violations as *Richardson* requires. Indeed, by the time of the *Richardson* decision, almost two years had passed since the completion of Mr. Dodd's direct appeal proceedings. *See United States v. Dodd*, 111 F.3d 867 (11th Cir. 1997).

Aware that 28 U.S.C. § 2255 ¶ 6(3) allowed a motion to be filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," but unsure as to what that meant, Mr. Dodd contemplated filing a section 2255 motion soon after *Richardson* was decided. He was, however, thwarted in this effort when, four months after the *Richardson* decision, he was transferred from his permanent facility – and away from his legal files – to the Southern District of Florida pursuant to a writ of habeas corpus ad testificandum filed by the Government. He remained separated from his legal files until his return to his permanent facility. He did not file his *pro se* section 2255 motion until 22 months after *Richardson*, on April 4, 2001.

Little more than a year after Mr. Dodd filed his section 2255 motion raising his *Richardson* claim, the Eleventh Circuit held that *Richardson* applied retroactively to cases on collateral review. *Ross v. United States*, 298 F.3d 677 (11th Cir. 2002). By the time *Ross* was decided, however, the

district court had already dismissed Mr. Dodd's section 2255 motion as untimely because not filed within a year of *Richardson*. *See* Appendix A-3. On appeal, Mr. Dodd urged the Eleventh Circuit to join the majority of circuits that had concluded that the one-year period in § 2255 ¶ 6(3) did not begin to run until the new rule at issue was made retroactively applicable to collateral cases. Under the majority position, Mr. Dodd argued, his motion was timely because filed within a year of *Ross*. The Eleventh Circuit panel noted there was a split in the circuits regarding the date that triggered the one-year limitation period, but rejected the majority's interpretation, and instead joined the Fifth Circuit to conclude that Mr. Dodd's section 2255 motion was untimely because filed more than a year from the decision in *Richardson*. *Dodd v. United States*, 365 F.3d 1273, 1281 (11th Cir. 2004).

Mr. Dodd is currently serving a 360-month sentence; a sentence driven by the 20-year mandatory minimum term and United States Sentencing Guideline applicable to CCE convictions. *See* 21 U.S.C. § 848; U.S.S.G. § 2D1.5 (1995). As discussed below, had Mr. Dodd filed his § 2255 motion in the Third, Fourth, Sixth, Seventh, or Ninth Circuit, it would have been deemed timely and his *Richardson* claim heard on its merits. However, because he had the misfortune of filing in the Southern District of Florida, and the Eleventh Circuit has interpreted section 2255 ¶ 6(3) in a way that defies the language of the statute, his only recourse now is to this Court. He respectfully asks the Court to grant his petition for writ of certiorari to resolve this intractable circuit split.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeal are Intractably Divided Over the Question Presented.

The Eleventh Circuit openly acknowledged that there is a conflict among the circuits regarding when the one-year limitations period under 28 U.S.C. § 2255 ¶ 6(3) commences. *Dodd*, 365 F.3d at 1277 (describing split). The conflict arises from the convoluted language of the statute of limitations provisions that were enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (1996), other portions of which this Court has already had cause to consider. *See, e.g., Clay v. United States*, 537 U.S. 522, 123 S. Ct. 1072, 155 L.Ed.2d 88 (2003); *Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 153 L.Ed.2d 260 (2002); *Artuz v Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L.Ed.2d 213 (2000). Indeed, § 2255 ¶ 6(3), and its companion § 2244(d)(1)(C), further demonstrate why "in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 2068, 138 L.Ed.2d 481 (1997).

The Eleventh Circuit followed the Fifth Circuit, and *dicta* by the Second and Eighth Circuits, to focus on the phrase "initially recognized" in § 2255 ¶ 6(3). In these circuits, when the Court issues a decision recognizing a new right, as it did in *Richardson*, a § 2255 motion must be filed within one year of that decision, regardless of whether the right has yet been found to apply retroactively to collateral cases. The Third, Fourth, Sixth, Seventh and Ninth Circuits flatly disagree, focusing instead on the phrase "and made retroactively applicable to cases on collateral review" to hold that the one-year period does not begin to run until either the Court or controlling circuit court has held that the relevant right applies retroactively to collateral cases. Compare *United States v. Lopez*, 248 F.3d 427, 433 (5th Cir.), *cert. denied*, 534 U.S. 898 (2001); *Triestman v. United States*,

124 F.3d 361, 371 & n.13 (2d Cir. 1997) (*dicta*); *Nelson v. United States*, 184 F.3d 953, 954 (8th Cir.) (*dicta*), *cert. denied*, 528 U.S. 1029, 120 S. Ct. 549, 145 L.Ed.2d 427 (1999); with *United States v. Lloyd*, 188 F.3d 184, 187-88 (3d Cir. 1999); *In re Vial*, 115 F.3d 1192, 1197 n.9 (4th Cir. 1997) (*en banc*); *Pryor v. United States*, 278 F.3d 612, 616 (6th Cir. 2002); *Ashley v. United States*, 266 F.3d 671, 674 (7th Cir. 2001); *United States v. Valdez*, 195 F.3d 544, 548 (9th Cir. 1999). The First and Tenth Circuits have noted the circuit split, but not yet taken sides. *See Sepulveda v. United States*, 330 F.3d 55, 65 n.5 (1st Cir. 2003); *Haugh v. Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000).

Importantly, this circuit conflict extends specifically to the treatment of *Richardson* claims. In the Seventh Circuit, a § 2255 motion is timely if filed within a year of when that court made *Richardson* retroactively applicable to collateral cases; in the Eleventh and Fifth Circuits, the limitations period expired a year after the Court decided *Richardson*. Compare *Fischer v. United States*, 285 F.3d 596, 600 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 867 (2003), with *Dodd*, 375 F.3d at 1281; *Lopez*, 248 F.3d 433.

The split also reaches down into the district courts, with an acknowledged split on the issue arising in two cases out of the same district. Compare *Berthoff v. United States*, 140 F.Supp.2d 50, 59-60 (D. Mass. 2001) (holding new limitations period "should run from the date on which either the Supreme Court of the controlling circuit court holds the new right to be retroactive on collateral review), *aff'd on other grounds*, 308 F.3d 124 (1st Cir. 2002), with *Breese v. Maloney*, ___ F.Supp.2d ___, 2004 WL 1497925 *4 (D. Mass. July 6, 2004) (expressly declining to follow *Berthoff*).

The Court's intervention is required because this split in the lower courts is intractable. Once a circuit decides when the one-year period begins to run under ¶ 6(3), future cases are litigated in

such a way that the courts in that circuit will rarely have an opportunity to reconsider that precedent. Indeed, Mr. Dodd's case only presents this important issue so squarely because the Eleventh Circuit was one of the few remaining courts of appeal that had not yet decided the question presented. Moreover, both the Fifth and Eleventh Circuits have recently reaffirmed their reading of the limitations provision, with no indication that they intend to reconsider their minority position. *See In re Hearn*, ___ F.3d ___, ___ n. 11, 2004 WL 1497552 n.11 (5th Cir. July 6, 2004) (one year limitations period under § 2244(d)(1)(C) for filing claim under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002), expired one year after date *Atkins* was issued); *Howard v. United States*, ___ F.3d ___, 2004 WL 1418433 (11th Cir. June 25, 2004) (holding § 2255 motion timely because filed within one year of decision in *Alabama v. Shelton*, 535 U.S. 654, 122 S. Ct. 1764, 152 L.Ed.2d 888 (2002)).

II. The Circuit Conflict is Untenable Given the Importance of the Question Presented.

The conflict over when the one-year limitations period begins to run under ¶ 6(3) merits this Court's attention. The issue can arise in any case in which a state or federal prisoner seeks relief under a new decision of the Court that has not yet been applied retroactively to collateral cases. For example, the Court's recent decision in *Blakely v. Washington*, ___ U.S. __, 124 S.Ct. 2531, ___ L.Ed.2d ___ (2004), has been described as potentially affecting thousands of federal prisoners. *Id.*, 124 S. Ct. at 2549 & n.2 (O'Connor, J., dissenting). Under the Eleventh Circuit's rule, large numbers of these prisoners will feel compelled to file protective § 2255 motions within a year of *Blakely* or risk losing all opportunity to obtain relief under that decision, even though *Blakely* has not yet been – and may never be – made retroactively applicable to cases on collateral review.

The importance of the conflict is heightened because it is outcome determinative. The

federal courts uniformly refuse to apply equitable tolling when a prisoner errs in computing the limitations deadline. Indeed, the Eleventh Circuit refused to do so for Mr. Dodd. *See Dodd*, 365 F.3d at 1282-83. Alternative remedies are likely unavailable. Federal courts have held that a *Richardson* claim fails to meet the stringent requirements for filing a successive § 2255 motion. *See* § 2255 ¶ 8; *Paulino v. United States*, 352 F.3d 1056, 1059 (6th Cir. 2003); *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003), *cert. denied*, ___ U.S. ___, 124 S. Ct. 2052, 158 L.Ed.2d 496 (2004). Moreover, federal courts, including the Eleventh Circuit, refuse to permit federal prisoners to pursue *Richardson* claims via a writ of habeas corpus under 28 U.S.C. § 2241. *See Sawyer v. Holder*, 326 F.3d 1363, 1367 (11th Cir.), *cert. denied*, ___ U.S. ___, 124 S. Ct. 258, 157 L.Ed.2d 181 (2003); *Wesson v. U.S. Penitentiary*, 305 F.3d 343, 347-48 (5th Cir. 2002), *cert. denied*, 537 U.S. 1241, 123 S. Ct. 1374, 155 L.Ed.2d 212 (2003).

It is therefore not surprising that seven different circuits have been forced to confront the question presented in recent years, and four others have felt the need to discuss it. District courts have also repeatedly been forced to choose between the competing interpretations of § 2255 ¶ 6(3). *See Breese*, ___ F.Supp.2d at ____, 2004 WL 1497925 *4; *Baylor v. United States*, 314 F.Supp.2d 47, 51-52 (D.D.C. 2004); *United States v. Washington*, 271 F.Supp.2d 278, 282 (D.D.C. 2003); *Little v. United States*, 184 F.Supp.2d 489, 495-96 (E.D. Va. 2002); *United States v. Tush*, 151 F.Supp.2d 1246, 1248-49 (D. Kan. 2001), *aff'd on other grounds*, 287 F.3d 1294 (10th Cir. 2002); *Berthoff*, 140 F.Supp.2d at 59-60. Indeed, the large number of reported cases on the question most likely understates substantially the frequency with which the issues arises. A large percentage of district court decisions on prisoner petitions are not reported, either electronically or in published volumes. This was true for Mr. Dodd.

III. The Eleventh Circuit's Holding is Wrong.

Certiorari furthermore is warranted because the Eleventh Circuit's holding is wrong. Not any right will make the limitations period begin. Instead, the right must have "*been newly recognized* by the Supreme Court *and made* retroactively applicable to cases on collateral review." § 2255¶ 6(3) (emphasis added). By using the words "has been" and "made," the statute imposes two restrictions that have to have been satisfied *before* the limitations period begins to run. This is so because "Congress' use of verb tense is significant in construing statutes," and the statute plainly uses the past tense in defining these restrictions. *United States v. Wilson*, 503 U.S. 329, 333, 112 S. Ct. 1351, 1354, 117 L.Ed.2d 593 (1992).

The interpretation of § 2255 ¶ 6(3) postulated by the Eleventh Circuit ignores the second of these requirements – that the right have been "made retroactively applicable to cases on collateral review." Rather, the court below excised this requirement from the statute to legislate judicially the policy result it desired. The Eleventh Circuit reasoned:

> It would not be logical for Congress to have enacted a strict one-year time limitation and then qualified that time frame by reference to ambiguous events. Rather, we believe Congress was simply reiterating the obvious: that § 2255(3) provides a narrow exception which can be relied upon only when the new right recognized by the Supreme Court can be retroactively applied on collateral review. Thus, the second clause in § 2255(3) qualifies the right asserted – not the time limit. [footnote omitted].

Dodd, 365 F.3d at 1279. But Congress did, in the Eleventh Circuit's words "qualif[y] that time frame." Congress imposed the two restrictions in the past tense. First, Congress stated that the Court already had to have newly recognized the right at issue. And second, Congress stated that a court already had to have made that right retroactive.

In excising the latter of these restrictions from the statute, the Eleventh Circuit contradicted

its avowed application of the plain meaning rule of construction by reasoning that "Congress was simply reiterating the obvious." That is, according to the Eleventh Circuit, Congress was simply repeating the statute's initial phrase, which states that the one-year limitation begins on the date that "right asserted was initially recognized by the Supreme Court," when Congress wrote "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." The only thing plain about the Eleventh Circuit's rewriting of § 2255 ¶ 6(3), however, is that is that it was Congress' role to do so, not the Eleventh Circuit's.

The very language of § 2255 ¶ 6(3) compels the majority position. It requires that the new right be both "newly recognized" *and* "made retroactively applicable" in order for the one-year limitations period to be triggered. § 2255 ¶ 6(3). *See Pryor*, 278 F.3d at 614 ("To apply 28 U.S.C. § 2255 ¶6(3), two conditions must be determined: (1) the date on which the Supreme Court has recognized a new right and (2) whether the right has been "made retroactively applicable to cases on collateral review."); *Vial*, 115 F.3d at 1197 n.9 (holding that where there is no ruling yet on collateral availability of a new rule, "the limitations period has not yet begun to run."). As the Ninth Circuit noted in *Valdez*, to hold that a motion is untimely if filed more than a year from when the Court announces a new right would be to "ignore[] the second requirement of [§ 2255 ¶ 6(3)] – that the right have been 'made retroactively applicable to cases on collateral review.'" *Valdez*, 195 F.3d at 547.

Moreover, there are the very practical problems that arise from the Eleventh Circuit's view. The Seventh Circuit concluded that the one year to file must begin on the date that the Supreme Court's decision is made retroactive,

> [o]therwise, ¶ 6(3) is a mirage, for retroactivity decisions often come more than a

year after opinions newly recognizing constitutional rights. Although this question has occasioned disagreement among the court of appeals, the cases holding that the time starts from the Supreme Court's decision, rather than from the date that decision is held to be retroactive, do not explain how this leaves any work for ¶ 6(3) to do given the inevitable gap between the main decision and the retroactivity decision.

Ashley, 266 F.3d at 673-74 (internal citation omitted).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

KATHLEEN M. WILLIAMS
Federal Public Defender

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Fort Lauderdale, Florida
July 14, 2004

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APPENDIX

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit.
Michael Donald Dodd v. United States, 365 F.3d 1273 (11th Cir. 2004) A-1

Final Judgment, United States District Court for the Southern District of Florida ... A-2

Report of United States Magistrate Judge A-3

APPENDIX A-1

Michael Donald DODD, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

No. 02-16134.

United States Court of Appeals, Eleventh Circuit.

April 16, 2004.

Background: Following affirmance of his conviction for engaging in a continuing criminal enterprise (CCE) and other offenses, 111 F3d 867, federal prisoner filed petition to vacate, set aside, or correct his sentence. The United States District Court for the Southern District of Florida, Nos. 93-00304-CR-FAM and 01-01347-CV-FAM, Charlene H. Sorrentino, United States Magistrate Judge, and Federico A. Moreno, J., dismissed the petition, and prisoner appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

(1) limitations period for postconviction claim based on new right recognized in *Richardson* began to run on the date when the Supreme Court initially recognized the right, rather than date on which court held the new right to be retroactive on collateral review, and

(2) petitioner was not entitled to equitable tolling of limitations period for filing postconviction claim.

Affirmed.

1. Habeas Corpus ⇐842, 846

Court reviews *de novo* a district court's determination that a petition for federal habeas corpus relief was time-barred, and likewise reviews *de novo* a district court's determination that equitable tolling is inapplicable; however, a district court's determinations of the facts relevant to a petitioner's equitable tolling claim will be reversed only if clearly erroneous.

2. Criminal Law ⇐1586

Richardson, which required jury to agree unanimously about which specific violations made up "continuing series of violations" of continuing criminal enterprise (CCE) charge, established a newly created right within the meaning of limitations period for postconviction claims based on newly recognized rights. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848; 28 U.S.C.A. § 2255(3).

3. Courts ⇐100(1)

New right announced in *Richardson*, which required jury to agree unanimously about which specific violations made up "continuing series of violations" of continuing criminal enterprise (CCE) charge, was retroactively available on collateral review. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

4. Criminal Law ⇐1586

One year limitations period for postconviction claim based on new right recognized in *Richardson*, which required jury to agree unanimously about which specific violations made up "continuing series of violations" of continuing criminal enterprise (CCE) charge, began to run on the date when the Supreme Court initially recognized the right, rather than date on which court held the new right to be retroactive on collateral review. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848; 28 U.S.C.A. § 2255(3).

5. Criminal Law ⇐1586

While equitable tolling is an extraordinary remedy which is typically applied sparingly, it can be applied to prevent the application of Antiterrorism and Effective Death Penalty Act's (AEDPA) statutory deadline on postconviction claims when extraordinary circumstances have worked to prevent an otherwise diligent petitioner from timely filing his petition. 28 U.S.C.A. § 2255.

6. Criminal Law ⇐1586

Petitioner was not entitled to equitable tolling of limitations period for filing postconviction claim during the period when he was transferred to another facility, and thus did not have access to his papers; petitioner's transfer was not unconstitutional or otherwise inappropriate, and petitioner, who did not claim that he made any specific efforts to file his motion within the established limitations period, did not that he acted with the diligence required to render equitable tolling appropriate. 28 U.S.C.A. § 2255(3).

Janice Bergmann (Court-Appointed), Fed. Pub. Def., Fort Lauderdale, FL, Kathleen M. Williams (Fed. Pub. Def.), Miami, FL, for Petitioner-Appellant.

Lisette M. Reid, Anne R. Schultz, U.S. Atty., Jonathan D. Colan, Miami, FL, for Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and MARCUS, Circuit Judges, and MUSGRAVE *, Judge.

* Honorable R. Kenton Musgrave, Judge, United States Court of International Trade, sitting by designation.

MARCUS, Circuit Judge:

Michael Donald Dodd, a federal prisoner, appeals the dismissal of his petition to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. Dodd claims that his conviction violated both the Sixth Amendment and the Due Process Clause because the district court failed to charge the jury that in order to find him guilty of engaging in a continuing criminal enterprise ("CCE"), in violation of 21 U.S.C. § 848, it had to find him guilty of each constituent violation by a unanimous vote. The district court dismissed Dodd's petition after adopting a Report and Recommendation from a magistrate judge which concluded that Dodd had failed to file his § 2255 application within the one-year statute of limitations applicable to such motions under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2255(1)-(4). After thorough review of the record and the parties' briefs, we find no reversible error and affirm.

I.

The factual background of this case is relatively straightforward, and we offer only the following brief summary of the relevant facts and procedural history. On June 25, 1993, a grand jury sitting in the United States District Court for the Southern District of Florida charged Dodd by superseding indictment with knowingly and intentionally engaging in a CCE, in violation of 21 U.S.C. §§ 841 and 846 ("Count I"); conspiring to possess with intent to distribute marijuana (as part of Count I's CCE), in violation of 21 U.S.C. § 841(a)(1) ("Count II"); conspiring to possess with intent to distribute cocaine (as part of Count I's CCE), in violation of 21 U.S.C. § 841(a)(1) ("Count III"); and sixteen counts of using and possessing a passport obtained by false statement, in violation of 18 U.S.C. § 1546(a) ("Counts IV-XIX"), arising out of his leadership role in the "Spangler Posse," a large Jamaican drug distribution network based in New York City, from the 1970's through at least the 1980's.

After trial by jury, Dodd was found guilty as to all counts except for Count III. The district court imposed a 360-month term of imprisonment, followed by five years of supervised release. On May 7, 1997, we affirmed his conviction on direct appeal. *See United States v. Dodd*, 111 F.3d 867 (11th Cir.1997) (per curiam). Dodd did not petition the Supreme Court for certiorari, and his conviction became final on August 6, 1997, when the time for filing a petition for certiorari expired.[1]

On April 4, 2001, more than three years later, Dodd filed this § 2255 petition, arguing that his Sixth Amendment and due process rights were violated because the jury in his underlying criminal case was not instructed that to find him guilty of the CCE count, it had to find him guilty of each constituent violation by a unanimous vote. Dodd based his argument on the Supreme Court's June 1, 1999, decision in *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999) (holding that to find a defendant guilty on a CCE count, a jury must find the defendant guilty by a unanimous vote of each of the constituent violations of the CCE).

1. This Court has held that where a prisoner does not file a petition for certiorari, "within the meaning of § 2255 . . . the judgment becomes final on the date on which the defendant's time for filing such a petition expires." *Kaufmann v. United States*, 282 F.3d 1336, 1339 (11th Cir.) (internal quotation marks omitted), *cert. denied*, 537 U.S. 875, 123 S.Ct. 287, 154 L.Ed.2d 127 (2002). Similarly, the Supreme Court has indicated that convictions become final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6, 107 S.Ct. 708, 712 n. 6, 93 L.Ed.2d 649 (1987). The period in which a petition for certiorari must be filed ordinarily ends ninety (90) days after the entry of judgment. Sup.Ct. R. 13. In this case, Dodd did not file a petition for certiorari, and his conviction became final 91 days after this Court affirmed his conviction on May 7, 1997.

In its response to Dodd's petition, the government argued that Dodd's motion was time-barred, because it had been filed well beyond AEDPA's one-year limitations period.[2] While the government conceded that the date the statute of limitations begins to run for a *Richardson* claim is unsettled in this Circuit, it urges us to hold that AEDPA's one-year statute of limitations period began to run on June 1, 1999, the day the Supreme Court decided *Richardson*. Under these circumstances, Dodd's petition—filed almost two years later—plainly would be untimely unless the statute of limitations were somehow tolled.

Dodd responds that the one-year statute of limitations period for *Richardson* claims did not begin to run until April 19, 2002, when this Court made *Richardson* retroactively applicable to cases on collateral review in *Ross v. United States*, 289 F.3d 677 (11th Cir.2002), *cert. denied*, 537 U.S. 1113, 123 S.Ct. 944, 154 L.Ed.2d 787 (2003). If we adopt this date as the trigger for the statute of limitations, then any motion filed prior to April 19, 2003—including Dodd's—would be timely.

In the alternative, Dodd says that even if the limitations period began to run immediately after *Richardson* was decided, it should be equitably tolled from October 25, 1999, to September 11, 2000, during which time he was in custody of the U.S. Marshal, did not have access to his legal papers, and was impeded from filing his motion. On October 25, 1999, Dodd was transported from the federal correctional facility in Talladega, Alabama, where he maintained his legal papers, to the federal detention center in Miami, Florida, pursuant to a writ of habeas corpus ad testificandum issued by the United States Attorney for the Southern District of Florida. During his time in Miami, Dodd's papers remained in Talladega. He was returned to Talladega on September 11, 2000.

Dodd filed his § 2255 motion approximately seven months later, on April 4, 2001. Subsequently, on October 18, 2001, the magistrate judge issued a Report and Recommendation concluding that Dodd's motion should be dismissed because (1) the motion was filed more than one year after the Supreme Court's decision in *Richardson*, and was thus time-barred, and (2) Dodd failed to demonstrate that the circumstances surrounding his late filing were extraordinary or could not have been overcome with due diligence. The district court adopted the magistrate judge's Report and Recommendation on October 31, 2001, and dismissed Dodd's motion as time-barred.

The district court granted Dodd a Certificate of Appealability on the issue of whether the limitations period should have been equitably tolled. This Court subsequently expanded the Certificate of Appealability to include the following issue:

> [F]or purposes of a newly recognized right, pursuant to 28 U.S.C. § 2255(3), does the one-year statute of limitations begin to run on the date the Supreme Court initially recognized the right, or (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]

2. AEDPA provides, at 28 U.S.C. § 2255, paragraph 6:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . .

does it begin on the date a court first held that the right is recognized retroactively on collateral review?

This question—regarding the date from whence the one-year limitations period of 28 U.S.C. § 2255(3) begins to run—has generated a split among our sister Circuits. *Compare United States v. Lopez*, 248 F.3d 427, 432–33 (5th Cir.2001) (concluding that limitations period begins to run on the date Supreme Court initially recognizes new right), *Nelson v. United States*, 184 F.3d 953, 954 (8th Cir.1999) (same), *Triestman v. United States*, 124 F.3d 361, 371 n. 13 (2d Cir.1997) (stating same in *dicta*) and *Donaldson v. United States*, Nos. 01–CV–1061(NPM) & 92–CR–51–001, 2002 WL 1839213 at *4 (N.D.N.Y. Aug. 6, 2002) (following *Triestman*) *with Ashley v. United States*, 266 F.3d 671, 673–74 (7th Cir.2001) (concluding that the limitations period begins to run on the date when the new right is declared to be retroactively applicable on collateral review), *United States v. Valdez*, 195 F.3d 544, 547–48 (9th Cir.1999), *United States v. Lloyd*, 188 F.3d 184, 187–88 (3d Cir.1999) (assuming that limitations period begins to run only after either Supreme Court's own retroactivity decision or decision by Court of Appeals declaring right retroactively available on collateral review within the relevant circuit), and *Berthoff v. United States*, 140 F.Supp.2d 50, 59–60 (D.Mass. 2001) ("[T]his Court ... believes the better interpretation of section 2255(3) is that the new limitations period should run from the date on which either the Supreme Court or the controlling circuit court holds the new right to be retroactive on collateral review.").

After thoroughly reviewing the record and the briefs, as well as the conflicting case law as to when the limitations period in § 2255(3) begins running, we affirm the dismissal of Dodd's § 2255 motion. In doing so, we jo... those circuits which have concluded that the limitations period in § 2255(3) is triggered on the date the Supreme Court initially recognizes a new right. We further hold that Dodd has failed to present sufficient evidence to support the application of the doctrine of equitable tolling, an "extraordinary remedy" which we apply only "sparingly." *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir.2000)

II.

[1] This Court reviews *de novo* a district court's determination "that a petition for federal habeas corpus relief was time-barred," *Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th Cir.2002), as we review all issues concerning statutory interpretation. *Kaufmann*, 282 F.3d at 1337; *see also United States v. Hooshmand*, 931 F.2d 725, 737 (11th Cir.1991). Likewise, we review *de novo* a "district court's determination that equitable tolling is inapplicable...." *Steed*, 219 F.3d at 1300. However, a district court's determinations of the facts relevant to a petitioner's equitable tolling claim "will be reversed only if clearly erroneous.... This standard requires us to affirm a district court's findings of fact unless 'the record lacks substantial evidence' to support that determination." *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1283 (11th Cir.2002) (citing *Dorsey v. Chapman*, 262 F.3d 1181, 1185 (11th Cir.2001) and quoting *Lightning v. Roadway Express, Inc.*, 60 F.3d 1551, 1558 (11th Cir.1995)), *cert. denied*, 537 U.S. 1237, 123 S.Ct. 1364, 155 L.Ed.2d 205 (2003). "We have squarely held that a determination regarding a party's diligence is a finding of fact that 'will not be disturbed unless clearly erroneous.'" *Id.* (quoting *Walters v. City of Atlanta*, 803 F.2d 1135, 1145 (11th Cir.1986)).

III.

We address, first, whether the district court erred in determining that, for the purposes of a newly recognized right pursuant to 28 U.S.C. § 2255(3), AEDPA's one-year statute of limitations begins to run on the date when the Supreme Court initially recognizes the right.

Subsection (3) of § 2255 provides that the statute's one-year period of limitation shall run from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]" 28 U.S.C. § 2255(3).

[2] We have recognized, as have the other circuits, that *Richardson* established a newly created right within the meaning of § 2255(3). *See Ross*, 289 F.3d at 681; *see also Santana-Madera v. United States*, 260 F.3d 133, 139 (2d Cir.2001); *Lopez*, 248 F.3d at 432; *Murr v. United States*, 200 F.3d 895, 906 (6th Cir.2000). Indeed, the government has expressly conceded this point. Appellees' Brief at 6 ("Dodd is correct in his assertion that the Supreme Court recognized a new right in *Richardson*.").

[3] There is likewise no doubt that the new right announced in *Richardson* is retroactively available on collateral review. *See Ross*, 289 F.3d at 681 (11th Cir.2002). Neither party contends that § 2255(3) requires that the retroactivity decision be made by the Supreme Court; rather, any court may do so. As a panel of this Court noted, every circuit to consider this issue has held that a court other than the Supreme Court can make the retroactivity decision for purposes of § 2255(3). *Garcia v. United States*, 278 F.3d 1210, 1213 n. 4 (11th Cir.) (citing *Lopez*, 248 F.3d at 431; *Ashley*, 266 F.3d at 673–74), *cert. denied*, 537 U.S. 895, 123 S.Ct. 180, 154 L.Ed.2d 163 (2002);[3] *see also United States v. Swinton*, 333 F.3d 481, 487 (3d Cir.) ("We conclude—and the parties agree—that the statute of limitations provision of § 2255 allows district courts and courts of appeals to make retroactivity decisions."), *cert. denied*, — U.S. —, 124 S.Ct. 458, 157 L.Ed.2d 330 (2003).[4]

3. In *Garcia*, a panel of this Court recognized but did not decide the issue of when the § 2255(3) limitations period begins to run. *See* 278 F.3d at 1213 n. 5. In that case, we identified the question as "whether the one-year limitation period begins to run on the date on which the right is initially recognized by the Supreme Court, or the date on which it is held retroactively applicable by the court of appeals or the Supreme Court[,]" and observed that:

> [t]here is a split among the circuits on how these questions should be answered.... It might present a problem to conclude *both* that the limitation begins to run when the Supreme Court initially recognizes the right *and* that a petitioner may not rely on that right until there is controlling circuit authority holding the right retroactively applicable to cases on collateral review, because in that case the opportunity for review offered by § 2255(3) would largely evaporate: as previously noted, it often happens that more than a year elapses before a right newly recognized by the Supreme Court is held to be retroactively applicable by an appellate court. In light of the circuit split and the absence of controlling authority in this Circuit, prudent petitioners will treat the earlier date—the date on which the right is newly recognized by the Supreme Court—as the date on which the one-year limitation period begins to run.

278 F.3d at 1213 n. 5.

4. The Fourth Circuit interpreted § 2255 in a case involving a second or successive habeas petition, noting in a footnote that "since the Supreme Court has not yet ruled on the collateral availability of the rule ... the limitations period has not yet begun to run." *In re Vial*, 115 F.3d 1192, 1197 n. 9 (4th Cir.1997) (*en banc*). As we noted in *Garcia*, however, that case involved a second or successive petition, rather than an initial petition, as in the instant case. *See Garcia*, 278 F.3d 1210, 1213 n. 4. The section of law pertinent to second or successive petitions explicitly requires the retroactivity determination to be made by the Supreme Court, stating that a court of appeals may authorize a second or successive application if it would rest on "a

[4] While Dodd's motion meets the substantive requirements of § 2255(3)—it is based on a new right identified by the Supreme Court in *Richardson* made retroactively applicable to cases on collateral review—the critical question remains whether his motion is timely. To state the issue in more specific terms, since Dodd filed his motion on April 4, 2001, it would not be timely if the one-year limitations period in § 2255(3) began to run on June 1, 1999, when the Supreme Court first recognized the new right by deciding *Richardson*. If, however, the statute of limitations did not begin to run until April 19, 2002, when this Court held in *Ross* that the newly created *Richardson* right was retroactively available on collateral review, then Dodd's motion was timely filed well before the limitations period ended on April 19, 2003.

We begin with the plain language of the statute in question. *See Harris v. Garner*, 216 F.3d 970, 972 (11th Cir.2000) (*en banc*) (noting that "courts should always begin the process of legislative interpretation, and ... often should end it as well, ... with the words of the statutory provision."). Here, as the Second Circuit noted, "the statute provides that the limitations period begins to run on 'the date on which the right asserted was *initially* recognized by the Supreme Court,' 28 U.S.C. § 2255 (emphasis added), which may be different from the date on which the right is later made retroactively available to cases on collateral review." *Triestman*, 124 F.3d at 371 n. 13. There is no reason to read the unambiguous term "initially" as signifying anything other than its common-sense and ordinary meaning of "from the beginning." *See Webster's Third New International Dictionary* 1164 (1961) (defining "initially" to mean "in the first place" and "at the beginning"). *See also In re Griffith*, 206 F.3d 1389, 1393 (11th Cir.2000) (*en banc*) ("In interpreting the language of a statute, we generally give the words used their ordinary meaning." (internal quotation marks and citations omitted)).

If the one-year limitation period runs *only* from the date on which the Supreme Court *initially* recognized the new right, we must determine the purpose of the qualifying clause that follows: "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(3). It would not be logical for Congress to have enacted a strict one-year time limitation and then qualified that time frame by reference to ambiguous events. Rather, we believe Congress was simply reiterating the obvious: that § 2255(3) provides a narrow exception which can be relied upon only when the new right recognized by the Supreme Court can be retroactively applied on collateral review. Thus, the second clause in § 2255(3) qualifies the right asserted—not the time limit.[5]

Put simply, if Congress intended the limitations period to begin running when a right was made retroactive, it could easily have said the limitation period shall run from the date on which a right newly recognized by the Supreme Court has been made retroactively applicable on collateral review. Instead, Congress has written that "[t]he limitation period shall run from ... the date on which the right asserted was *initially* recognized by the Supreme Court...." 28 U.S.C. § 2255(3) (emphasis added). There is no reason to believe that Congress intended this unequivocal phrase to mean anything other than what it says. *See United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (*en banc*) ("[W]e must presume that Congress said what it meant and meant what it said." (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992))).

We turn then to the problem that a panel of this Court recognized in *Garcia*: that the opportunity for review presented by § 2255(3) would disappear if, at the same time we concluded that the limitation period begins to run when the Supreme Court initially recognizes the right, we also determined that a petitioner could not rely on that right until there is controlling circuit authority holding the right retroactively available. *Garcia*, 278 F.3d at 1213 n. 5; *see also Ashley*, 266 F.3d at 673–74 (under such an interpretation, § 2255(3) would be a "mirage," given that more than a year can elapse between Supreme Court decision and retroactivity ruling). While our holding today embraces the former proposition, we explicitly reject the latter.

Implicit in the conclusion that *any* court may make the retroactivity decision is the necessary inference that a petitioner *need not* wait for a controlling decision before filing his petition. Because a petitioner need not wait for the Supreme Court to address the issue of retroactivity, he may assert a claim in a district court as soon as a new right is recognized by the Supreme Court—in the hope, of course, that the district court will find the new right retroactively available on collateral review. *See Swinton*, 333 F.3d at 487 ("the statute of limitations provision of § 2255 allows district courts and courts of appeals to make retroactivity decisions."). Under this interpretation, therefore, a petitioner may file a § 2255(3) motion *immediately* after the Supreme Court decision announcing the right upon which the motion is based.

As a result, our analysis favors petitioners hoping to benefit from new rules announced by the Supreme Court. In cases based on *Richardson* rights, under our analysis, a petitioner could have filed a § 2255(3) motion immediately after the decision, or as early as June 2, 1999. Under the interpretation urged by Dodd, however, where the limitations period is not triggered until the right is made retroactively applicable, petitioners in this Circuit would have had to wait to file until this Court decided *Ross* in April 2002, meaning that prisoners would have to sit on their rights for almost three years. And in other circuits, where even more time elapsed before a decision on retroactivity was made, the wait could be even longer. Finally, if all petitioners faithfully awaited a retroactivity decision before asserting their rights—a situation theoretically possible if not practically imaginable—the Supreme Court and the circuits might never have occasion to make a retroactivity decision and the one-year window for filing a § 2255(3) motion might *never* open.

Moreover, Dodd's argument loses much of its force when we observe that in his own case he did not stand idly by for the three years before *Ross* was decided: indeed, Dodd filed his motion more than a year before that decision. Here, Dodd's actions speak louder than his words, and suggest that, at bottom, his argument really is that a petitioner may file a § 2255(3) motion beginning immediately after the Supreme Court announces a new right, *and* at any time up until one year after the first retroactivity decision is handed down. For motions relying on *Richardson* in this Circuit, then, Dodd effectively urges a limitations period of nearly four years, from

new rule of constitutional law, *made retroactive to cases on collateral review by the Supreme Court*, that was previously unavailable." 28 U.S.C. § 2255 ¶ 8(2) (emphasis added).

5. As the Fifth Circuit noted, "[t]he portion of § 2255(3) that triggers [the] limitations period contains the phrase 'right asserted.' Subsequently, 'that right' is limited by the retroactivity requirement. Therefore the retroactivity on collateral review aspect is not *contained within* the term 'right[,]' " *Lopez*, 248 F.3d at 433 (emphasis added), but rather qualifies and limits it.

June 1, 1999, when *Richardson* was decided, until April 19, 2003, a year after the *Ross* decision. This putative four-year period of limitations—a period which could be significantly longer in many circumstances—cannot be squared with AEDPA's unambiguous intention to bring certainty to this area of the law, and to give petitioners but a single year in which to file their claims.

Moreover, if we adopted Dodd's analysis and concluded that the limitations period in § 2255(3) did not begin to run until controlling circuit authority held a right retroactively applicable to cases on collateral review, this would yield not only different start dates in different jurisdictions, but also would result in uncertain limitations periods throughout the nation. The limitations period in each federal circuit could have a different start date, depending on when the retroactivity issue was decided there. In different circuits, petitioners would have to sit on their hands for different lengths of time, unable to assert their claims until after a retroactivity decision was made for the one-year window of opportunity to open.[6]

Alternatively, if the period began immediately after the Supreme Court decision and lasted until a year from the first retroactivity decision, each circuit would effectively have a different statute of limitations, many of which could stretch on for years. *See Lopez*, 248 F.3d at 433 (noting that if the limitations period only begins with the retroactivity decision, multiple situations could arise in which "the limitations period would never be triggered, and any petitioner's out-of-time motion would be timely, a likely unintended consequence by Congress."). So unpredictable and inconsistent a result would neither further the interest of judicial efficiency nor be consonant with the intent of a statute which, on its face, plainly aims to establish a single, uniform statute of limitations.

Because we interpret the limitations period according to its plain language, and consistently with the policy choices underlying AEDPA, we conclude that the one-year window of opportunity in which Dodd could have timely filed a habeas petition asserting the right recognized in *Richardson* opened on June 1, 1999, when that case was decided, and closed one year later. Since Dodd did not file his § 2255 motion until April 4, 2001 (almost three years later), the district court properly determined that it was time-barred, unless the statute of limitations was equitably tolled.

IV.

We are unpersuaded by Dodd's alternative argument that the district court erred in concluding that he was not entitled to "equitable tolling."[7]

6. We note further that, even within a single circuit, retroactivity decisions by different district courts would arguably trigger the limitations period at different times, injecting still further uncertainty into the determination of the appropriate limitations period. Moreover, more than a year might often elapse between the time a district court initially found a new right retroactively available on collateral review and the time the circuit court reviewed that decision.

7. In addition to arguing for equitable tolling, Dodd also suggested in the district court that his motion was timely based on 28 U.S.C. § 2255(2), which provides that the one-year statute of limitations begins after "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed." This issue is beyond the scope of Dodd's Certificate of Appealability ("COA"), and therefore not properly reviewed by this Court. *See Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir.1998) ("[W]e hold that in an appeal brought by an unsuccessful habeas petitioner, appellate review is limited to the issues specified in the COA."). Moreover, even if the issue were properly before us, Dodd's contentions would still fail.

Dodd says that even if we hold that the limitations period embodied in § 2255(3) began to run immediately after the *Richardson* decision, his motion is still timely because of equitable tolling from October 25, 1999 to September 11, 2000. Dodd explains that 146 days elapsed between the *Richardson* decision on June 1, 1999, and his transfer from Talladega on October 25, 1999, and that 205 days elapsed between his return to Talladega on September 11, 2000, and the time he filed his motion on April 4, 2001. Thus, Dodd argues, if the statute of limitations were tolled during the time Dodd was away from Talladega, only 351 days (146 + 205 days) would have elapsed from the date of the *Richardson* decision to Dodd's filing, bringing his motion within the one-year limitations period. See *Knight v. Schofield*, 292 F.3d 709, 712 (11th Cir.2002) (explaining that "the clock is stopped while tolling is in effect").

Dodd also says that during the period after his return to Talladega, he spent considerable time trying to obtain documentation, and that the government would not provide him with the necessary material until he filed suit under the Freedom of Information Act, 5 U.S.C. § 552. Dodd seems to suggest, therefore, that his motion was filed as swiftly as was possible under the circumstances. He does not contend, however, that he made any attempt to have his legal papers forwarded to him while he was in Miami.

The government responds that equitable tolling is not applicable here, given the nearly five months Dodd had to file a motion based on *Richardson* before his transfer to Miami *and* the seven additional months he spent after his return to Talladega before filing his motion. Thus, the government urges, Dodd has not shown that his untimely filing was due to extraordinary circumstances beyond his control and otherwise unavoidable even with due diligence.

[5] While equitable tolling is an "extraordinary remedy which is typically applied sparingly," *Steed*, 219 F.3d at 1300, it "can be applied to prevent the application of AEDPA's statutory deadline when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition." *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1312 (11th Cir.2001); *see also Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir.1999) (holding that the limitations period may be equitably tolled where "a movant untimely files because of *extraordinary circumstances* that are both beyond his control and *unavoidable even with diligence*" (emphasis added)). "The burden of establishing entitlement to this extraordinary remedy plainly rests with the petitioner." *Drew*, 297 F.3d at 1286. To establish diligence, then, the petitioner must present evidence showing reasonable efforts to timely file his action. *Id.* at 1287–89.

In *Akins*, a panel of this Court held that equitable tolling was inapplicable for periods of various lockdowns or during a period in which the movant's legal papers were misplaced by the prison. 204 F.3d at 1089–90. It is true that the facts of *Akins* are distinguishable from the case at hand, as the § 2255 movant there had failed to act for four years prior to the enactment of AEDPA, at least seven months after he

As a panel of this Court held in *Akins v. United States*, in order to prevail under § 2255(2), an alleged governmental impediment must be unconstitutional, one that is "not 'reasonably related to legitimate penological interests.'" 204 F.3d 1086, 1090 (11th Cir.2000) (citation omitted). Dodd does not argue that his time spent in the custody of the U.S. Marshal in Miami was unconstitutional, and thus, this detention cannot support a claim under § 2255(2).

obtained a transcript which he deemed necessary to his case, and at least six months after the enactment of AEDPA. Nonetheless, *Akins* suggests that lockdowns and periods in which a prisoner is separated from his legal papers are not "extraordinary circumstances" in which equitable tolling is appropriate.

[6] While Dodd contends that the limitations period in § 2255(3) should have been tolled during the period he was detained in Miami and did not have access to his papers, we cannot discern sufficient evidence in this record to establish that the circumstances were truly extraordinary. Dodd does not suggest, let alone argue that his detention was unconstitutional or somehow inappropriate, or that the transfer of a prisoner from one facility to another is anything but a routine practice.

Nor has Dodd shown that he acted with the diligence required to render equitable tolling appropriate to this case. Following the *Richardson* decision, Dodd had nearly *five* additional months with no impediments to stop him from preparing or filing a § 2255 motion. Moreover, Dodd has presented no evidence to show that, while he was in custody in Miami, he made any request to have his papers delivered to him,[5] attempted to contact counsel to assist him with timely filing his motion, or otherwise undertook any action that would suggest reasonable diligence under the circumstances. Indeed, Dodd has not claimed that he made any specific efforts to file his motion within the established limitations period, either in the five months before he was transferred to Miami or in the *seven* months after his return to Talladega.

Simply put, Dodd has not shown with any degree of particularity what efforts he made that would even arguably constitute an appropriate degree of diligence for someone in his situation. Nor, finally, has he demonstrated why, if he had acted with the diligence plainly required to trigger the doctrine of equitable tolling, he could not have filed within the one-year period. Quite simply, we cannot conclude that the district court's finding that Dodd failed to demonstrate due diligence was clearly erroneous, and, as a result, Dodd's "lack of diligence bars us from reaching out and granting the rare and extraordinary remedy of equitable tolling." *Drew*, 297 F.3d at 1290 n. 5.

V.

Accordingly, we hold today that, for the purposes of a newly recognized right under 28 U.S.C. § 2255(3), the one-year statute of limitations begins to run on the date the Supreme Court *initially* recognizes the right. As a result, Dodd's § 2255 motion, filed nearly two years after the Supreme Court initially recognized the new right in *Richardson*, is barred by the applicable one-year limitations period. Moreover, Dodd is not entitled to equitable tolling of the limitations period because he has shown neither extraordinary circumstances nor the diligence necessary to toll the statute. It follows that the district court did not err in dismissing Dodd's § 2255 motion as untimely.

AFFIRMED.

5. On appeal, Dodd's counsel asserts that Dodd was prevented from taking his legal materials with him to Miami "[p]ursuant to a policy of the Federal Bureau of Prisons," thus apparently implying that his failure to exercise diligence in requesting his legal papers should be excused for futility. Appellant's Brief at 24. However, Dodd's counsel does not direct our attention to such a policy, citing only an Inmate Personal Property Record—an inventory of his property stored at Talladega—appended as an exhibit to Dodd's Reply to the Government's Response to his § 2255 Motion. Notably, in his Reply, Dodd cites this exhibit only to prove that his files remained in Talladega, not that they were maintained there, against his wishes, pursuant to a particular policy. The unsupported suggestion of futility, without more, is insufficient to defeat the diligence required in this context. Nor would this period excuse the failure to act for the seven months *after* he was returned to Talladega.

APPENDIX A-2

CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-1347-CIV-MORENO
(93-304-CR-MORENO)
MAGISTRATE JUDGE SORRENTINO

MICHAEL DONALD DODD,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.,

ORDER OF DISMISSAL
MOTION TO VACATE

FILED by D.C.
OCT 31 2001
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA.

For the reasons stated in the Report of the Magistrate Judge and upon independent review of the file, it is

ORDERED AND ADJUDGED as follows:

1. This motion to vacate pursuant to 28 U.S.C. §2255 is dismissed, as time barred.

2. All motions related to the civil case not otherwise ruled upon are dismissed, as moot.

3. The case is closed.

DONE AND ORDERED at Miami, Florida, this 31st day of October, 2001.

UNITED STATES DISTRICT JUDGE

cc: Michael Donald Dodd, Pro Se
Jacqueline Becerra, AUSA

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APPENDIX A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-1347-CIV-MORENO
(93-304-CR-MORENO)
MAGISTRATE JUDGE SORRENTINO

MICHAEL DONALD DODD,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT RE DISMISSAL OF §2255 MOTION AS TIME-BARRED

FILED by MAG. SEC D.C.
OCT 18 2001
CLARENCE MADDOX CLERK U.S. DIST. CT. S.D. OF FLA - MIAMI

This motion to vacate pursuant to 28 U.S.C. §2255 was filed by the clerk on April 4, 2001. The judgment of conviction in the underlying criminal case, No. 93-304-Cr-Moreno, became final on or about August 7, 1997, when time expired for filing a petition for writ of certiorari.[1]

The government has invoked the statute of limitations. Pursuant to 28 U.S.C. §2255, as amended April 24, 1996, a one year period of limitations applies to a motion under the section. The one year period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the

[1]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for writ of certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986). Ordinarily, a petition for writ of certiorari must be filed within 90 days of the date of the entry of judgment rather than the issuance of a mandate. Sup.Ct.R. 13.

Constitution or laws of the United States is removed, if the movant is prevented from making a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

A jury convicted Dodd of engaging in a criminal enterprise, conspiring to possess with intent to distribute cocaine and marijuana, and using a fraudulent document to gain entry into the United States. The Court sentenced him to 360 months imprisonment. Dodd's convictions and sentences were affirmed in an opinion entered on May 7, 1997. (DE# 144). He did not petition the Supreme Court for writ of certiorari, and his convictions became final on or about August 7, 1997, when time expired for doing so. He filed this motion to vacate well over one year later on April 4, 2001.

Dodd replied to the government's response, and argued that the motion is timely because it was filed within one year of the date that the Supreme Court issued Apprendi v. New Jersey, 530 U.S. 466 (2000) on June 26, 2000 and that the motion is based in part upon Richardson v. United States, 526 U.S. 813 (1999). He argues that both cases apply retroactively to cases on collateral review, and therefore defeat the statute of limitations. Dodd also argues that the limitations period should be equitably tolled and the motion

deemed to be timely filed, based upon the fact that he was transferred from the Institution where he is usually housed and where his papers were located.

It is initially noted that the Supreme Court did not newly recognize a right which is retroactively applicable to cases on collateral review in Apprendi, supra, and that the Eleventh Circuit has recently held that Apprendi does not apply retroactively to cases on collateral review. See McCoy v. United States, ___ F.3d ___, 2001 WL 1131653 (11 Cir. 2001).

Richardson, supra was decided in 1999, more than one year before this motion to vacate was filed. Thus Dodd's reliance upon Richardson does not overcome the statute of limitations.

The Eleventh Circuit has held that the limitations period may be equitably tolled when a movant's timely filing of a motion to vacate is impeded by extraordinary circumstances beyond his control and unavoidable even with due diligence. Sandvik v. U.S., 177 F.3d 1269 (11 Cir. 1999).

Dodd has not demonstrated that the circumstances underlying the untimely filing of the motion to vacate are extraordinary or that the delay was unavoidable even with due diligence. His claims

are based upon Richardson, supra, which was decided on June 1, 1999, four months before he was transferred from the correctional facility. After he was returned to the facility, he waited seven additional months before filing this motion to vacate. He has failed to demonstrate either that the state created an impediment which prevented his timely filing, or that extraordinary circumstances existed which entitle him to equitable tolling.

It is therefore recommended that this motion to vacate be dismissed as time-barred.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: October 18, 2001

Charlene H. Sorrentino
UNITED STATES MAGISTRATE JUDGE

cc: Michael Donald Dodd, Pro Se
Reg. No. 09925-424
FCI - Talladega
565 East Renfroe Road
Talladega, AL 35160

Jacqueline Becerra
Assistant United States Attorney
99 N.E. 4th Street
Miami, FL 33132-2111

No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

MICHAEL DONALD DODD,
Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I certify that on this 14th day of July, 2004, in accordance with SUP. CT. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed *In Forma Pauperis*, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by U.S. mail upon the United States Attorney for the Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132-2111, and upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

KATHLEEN M. WILLIAMS
Federal Public Defender

Fort Lauderdale, Florida
July 14, 2004

By: Janice L. Bergmann
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No:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

MICHAEL DONALD DODD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
JUL 14 2004
OFFICE OF THE CLERK

DECLARATION VERIFYING TIMELY FILING

Petitioner, Michael Donald Dodd, through undersigned counsel and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter was placed in the U.S. mail in a prepaid first class envelope, addressed to the Clerk of the Supreme Court of the United States, on the 14th day of July, 2004, which is prior to the time the petition for writ of certiorari is due on July 15, 2004.

KATHLEEN M. WILLIAMS
Federal Public Defender

Fort Lauderdale, Florida
July 14, 2004

By: _____

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No. 04-5286

FILED
OCT 20 2004
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IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL DONALD DODD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

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Department of Justice
Washington, D.C. 20530-0001
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QUESTION PRESENTED

Whether the one-year limitations period in 28 U.S.C. 2255 ¶ 6(3) begins to run on the date on which the right asserted is initially recognized by this Court or whether, instead, the limitations period begins to run on the date on which this Court or another court first holds that the relevant right applies retroactively to cases on collateral review.

IN THE SUPREME COURT OF THE UNITED STATES

No. 04-5286

MICHAEL DONALD DODD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCU

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 365 F.3d 1273. The district court's order of dismissal (Pet. App. A2) is unreported, as is the report and recommendation of the magistrate judge (Pet. App. A3) on which the district court relied.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2004. The petition for a writ of certiorari was filed on July 14, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On June 25, 1993, petitioner was indicted in the United States District Court for the Southern District of Florida, for knowingly

and intentionally engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (Count 1); conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (Count 2); conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 (Count 3); and sixteen counts of using and possessing a passport obtained by false statement, in violation of 18 U.S.C. 1546(a) (Counts 4-19). After a jury trial, petitioner was found guilty on all counts except Count 3. Petitioner was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed the conviction on May 7, 1997. See United States v. Dodd, 111 F.3d 867 (11th Cir. 1997) (per curiam); Pet. App. A1 at 1275.

On April 4, 2001, petitioner filed a motion under Section 28 U.S.C. 2255. The district court dismissed the motion as time-barred, Pet. App. A2, and the court of appeals affirmed the dismissal. Pet. App. A1 at 1283-84.

1. Petitioner was a leader of a large Jamaican drug distribution network in New York City called the "Sprangler Posse." Gov't C.A. Br. 4.[1] In September 1988, Audley Antonio and Ainsley Brown were arrested in Mississippi transporting more than $500,000 in U.S. currency hidden in their vehicles. The cash was destined for delivery to Manley Cargill, who was a source of cocaine for the Sprangler Posse. Id. at 3-4. At trial, the government called five witnesses who were actively involved in the Sprangler Posse in the

[1] "Gov't C.A. Br." refers to the government's brief in the initial appeal of petitioner's conviction, in United States v. Dodd, No. 95-4978.

1970s and 1980s. Their testimony demonstrated that the Posse sold both marijuana and cocaine in Manhattan at least until the late 1980s, and that petitioner was one of the organization's leaders.

For example, Antonio testified that he was recruited into the drug operation by petitioner in 1986, and that his responsibilities increased from counting money, to delivering small quantities of marijuana within New York City, to traveling with petitioner to Florida to buy cocaine. Gov't C.A. Br. 5-6. Neville Pedro bought small amounts of marijuana from petitioner, then began buying marijuana from him in 30- to 60-pound bundles, and eventually was transporting as much as 500 to 1000 pounds at a time from Florida for delivery to petitioner. Id. at 12. Other members of the Sprangler Posse testified that they bought marijuana and cocaine from petitioner for resale. Id. at 13-14. In addition, an INS agent testified that petitioner had traveled in and out of the United States more than 35 times with a passport that had a false name and false date of birth. Id. at 16.

2. Petitioner appealed his conviction, challenging certain statements made by the prosecutor and by a government witness and arguing that he should have received an adjustment for acceptance of responsibility. On May 7, 1997, the court of appeals affirmed the conviction and sentence. See United States v. Dodd, 111 F.3d 867 (11th Cir. 1997) (per curiam). Petitioner did not file a petition for a writ of certiorari, and his conviction therefore became final on August 6, 1997, when the time for filing such a petition expired. Pet. App. A1 at 1275.

3. On June 1, 1999, this Court decided Richardson v. United States, 526 U.S. 813 (1999), which held that the CCE statute requires unanimous jury agreement on the predicate drug violations that compose the continuing series necessary for conviction.

4. On April 4, 2001, more than three years after his conviction became final and nearly two years after this Court's decision in Richardson, petitioner filed a motion under Section 2255, arguing that his Sixth Amendment and due process rights were violated because the jury in his underlying criminal case was not instructed that it had to reach unanimous agreement on the drug violations that composed the CCE. The government argued that petitioner's claim was time-barred, because it was filed beyond the one-year limitations period set forth in 28 U.S.C. 2255 ¶ 6, which provides:

> A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of --
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Petitioner responded that the motion was timely because it was filed

within a year of this Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), and also noted that the motion was based in part on Richardson. Pet. App. A3 at 2. In addition, he argued that the limitations period should be equitably tolled because he had been transferred to another facility during that time period. Id. at 2-3.

The district court, adopting the reasoning of the magistrate judge's report and recommendation, rejected those arguments and dismissed the motion as time-barred. Pet. App. A2. The court concluded, first, that the Eleventh Circuit had held, in McCoy v. United States, 266 F.3d 1245, 1259 (2001), that Apprendi does not apply retroactively to cases on collateral review; second, that Richardson had been decided more than one year before petitioner filed his Section 2255 motion, which was therefore outside the limitations period; and third, that petitioner had not demonstrated the extraordinary circumstances that would justify equitable tolling. Pet. App. A3 at 3-4.

5. The court of appeals affirmed the dismissal. Pet. App. A1.

a. On appeal, petitioner contended, inter alia, that the one-year limitations period defined in 28 U.S.C. 2255 ¶ 6(3) did not begin to run until April 19, 2002, the date on which the court of appeals decided Ross v. United States, 289 F.3d 677 (11th Cir. 2002), cert. denied, 537 U.S. 1113 (2003), which held that the rule announced in Richardson applied retroactively to cases on collateral review. Pet. App. A1 at 1276. The government disagreed, arguing that the limitation period began to run on the date this Court

decided Richardson. The court of appeals, while acknowledging a circuit split on the question, agreed with the government's position. Id. at 1277.

As a preliminary matter, the court of appeals noted that it had already held that Richardson established a newly created right within the meaning of 2255 ¶ 6(3), and that the right is retroactively available on collateral review. Pet. App. A1 at 1278 (citing Ross). The court also correctly noted that "[n]either party contends that 2255(3) requires that the retroactivity decision be made by the Supreme Court; rather, any court may do so." Ibid.

Turning to the question of when the limitations period begins to run, the court noted that "the statute provides that the limitations period begins to run on the date on which the right asserted was initially recognized by the Supreme Court." Pet. App. A1 at 1279 (quoting Triestman v. United States, 124 F.3d 361, 371 n.13 (2d Cir. 1997)). The court found that "[t]here is no reason to read the unambiguous term 'initially' as signifying anything other than its common-sense and ordinary meaning of 'from the beginning.'" Ibid.

The court of appeals then addressed "the purpose of the qualifying clause that follows: 'if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.'" Pet. App. A1 at 1279 (quoting 28 U.S.C. 2255 ¶ 6(3)). The court reasoned that "[i]t would not be logical for Congress to have enacted a strict one-year time limitation and then qualified that time frame by reference to

ambiguous events." Ibid. Instead, the court concluded that the clause "simply reiterat[es] the obvious": that Section 2255 ¶ 6(3) "provides a narrow exception which can be relied upon only when the new right recognized by the Supreme Court can be retroactively applied on collateral review." Thus, the court found, the second clause in Section 2255 ¶ 6(3) "qualifies the right asserted -- not the time limit." Ibid. The court of appeals concluded:

> If Congress intended the limitations period to begin running when a right was made retroactive, it could easily have said the limitation period shall run from the date on which a right newly recognized by the Supreme Court has been made retroactively applicable on collateral review. Instead, Congress has written that "[t]he limitation period shall run from ... the date on which the right asserted was initially recognized by the Supreme Court...." 28 U.S.C. § 2255(3) (emphasis added). There is no reason to believe that Congress intended this unequivocal phrase to mean anything other than what it says.

Id. at 1279-1280.

DISCUSSION

Petitioner contends (Pet. 5-8) that this Court's review is warranted to resolve a conflict in the circuits on the question whether the one-year limitations period in 28 U.S.C. 2255 ¶ 6(3) begins to run on the date on which the right asserted is initially recognized by this Court or, instead, on the date on which a court holds that the relevant right applies retroactively to cases on collateral review. The government agrees that there is a circuit conflict, and that the conflict is unlikely to dissipate through further consideration of the issue in the courts of appeals. Furthermore, the frequency with which the courts of appeals have had to address the issue confirms that it is a recurring one.

Therefore, although the government agrees with the court of appeals' resolution of the question presented in this case, the petition for a writ of certiorari should be granted.[2]

1. The Eleventh Circuit's holding in this case that the limitations period begins to run on the date on which the right asserted is initially recognized by this Court was also adopted by the Fifth Circuit in United States v. Lopez, 248 F.3d 427, 432-433, cert. denied, 534 U.S. 898 (2001). In Lopez, as in the present case, the prisoner challenged his conviction by relying on the rule of Richardson. The Fifth Circuit noted that Section 2255 provides that the limitations period "runs for one year from 'the date on which the right asserted was initially recognized by the Supreme Court.'" 248 F.3d at 432 (quoting 28 U.S.C. 2255 ¶ 6(3)). The court concluded that "[t]he better interpretation of when a right is initially recognized is one that commences the limitations period on the date the Supreme Court acknowledges the right." Id. at 432.

The Second and Eighth Circuits have expressed agreement with that position. In Nelson v. United States, 184 F.3d 953 (8th Cir.),

[2] The Eleventh Circuit and other circuits have held that Richardson v. United States, 526 U.S. 813 (1999), should be applied retroactively on collateral reivew to cases that had become final before Richardson was decided. Pet. App. A1 at 1278 (citing cases). The government has consistently taken the position that Richardson should not be applied retroactively because it does not "alter[] the range of conduct or the class of persons that the law punishes," Schriro v. Summerlin, 124 S. Ct. 2519, 2523 (2004), and does not otherwise come within an exception to the rule of Teague v. Lane, 489 U.S. 288 (1989). This case does not present any question concerning the retroactivity of Richardson, however, because the court of appeals ruled that petitioner's Section 2255 motion was untimely on the ground that it was filed more than one year after Richardson was decided, and that holding would remain regardless of the retroactivity of Richardson.

cert. denied, 528 U.S. 1029 (1999), the Eighth Circuit held that this Court's decision in Old Chief v. United States, 519 U.S. 172 (1997), is not retroactive to cases on collateral review under paragraph 6(3), and that the prisoner in that case therefore could not rely on paragraph 6(3) to support the timeliness of his Section 2255 motion raising an Old Chief claim. In reaching that conclusion, the court of appeals framed the analysis in this way:

> If the right is both newly recognized and operates retroactively, the Supreme Court's decision conferring that right may offer an avenue for 2255 relief. In such a case, the statute of limitations for habeas corpus relief expires one year following the decision.

Nelson, 184 F.3d at 954 (emphasis added). In Treistman v. United States, 124 F.3d 361, 371 n.13 (2d Cir. 1997), the Second Circuit similarly noted, in dicta, that "the limitations period begins to run on 'the date on which the right asserted was initially recognized by the Supreme Court' 28 U.S.C. 2255 (emphasis added), which may be different from the date on which the right is later made retroactively available to cases on collateral review."

Four circuits, however, have reached contrary holdings. In United States v. Lloyd, 188 F.3d 184 (3d Cir. 1999), the prisoner's Section 2255 motion challenged his sentence in light of this Court's decision in Bailey v. United States, 516 U.S. 137 (1995). Although the prisoner's motion was filed more than two years after Bailey, the Third Circuit deemed it timely. The court explained that it was timely because it was filed within one year of Bousley v. United States, 523 U.S. 614 (1998), and United States v. Davis, 112 F.3d 118 (3d Cir. 1997), in which the rule in Bailey was held

retroactively applicable to cases on collateral review by this Court and by the court of appeals, respectively. See Lloyd, 188 F.3d at 188. The court concluded that it need not decide which court had to make a right retroactively applicable in order for it to be available under Section 2255 ¶ 6(3), because the petition in Lloyd "was timely under either rule." Ibid. The court accordingly adopted the position that the one-year limitation period under paragraph 6(3) begins to run on the date of a holding that the right asserted is retroactive -- not the date on which this Court initially recognizes the right.

The Ninth Circuit reached the same conclusion in United States v. Valdez, 195 F.3d 544 (1999), which also involved a claim resting on Bailey. The government asserted that the petition, filed more than 20 months after Bailey, was untimely, but the court of appeals rejected that argument, stating that it "ignores the second requirement of the provision -- that the right have been made retroactively applicable to cases on collateral review." Valdez, 195 F.3d at 547 (internal quotation marks and citation omitted). Expressly disagreeing with the Second Circuit's statement in Triestman, see 195 F.3d at 548 n.8, the court "conclude[d] that the one-year period of limitation under § 2255 [¶ 6](3) began to run on May 18, 1998, the date Bousley was decided" by this Court. 193 F.3d at 548. On that basis, the court held that the prisoner's Section 2255 motion, which was filed before Bousley was decided, was timely. Id. at 548.

In Ashley v. United States, 266 F.3d 671 (2001), the Seventh

Circuit reversed a district court decision that had dismissed a claim raised on collateral review based on Apprendi v. New Jersey, 530 U.S. 466 (2000). The district court had reasoned that "until the Supreme Court itself declares that a new decision applies retroactively on collateral review, subparagraph (3) does not open a new filing window for prisoners." Ashley, 266 F.3d at 672. The court of appeals disagreed and held that, for initial Section 2255 motions, "[d]istrict and appellate courts, no less than the Supreme Court, may issue opinions" holding that a Supreme Court decision is retroactively applicable to cases on collateral review. Id. at 673. The court then stated that "[t]he one year to file under 2255 ¶ 6(3) begins, not on the date of the Supreme Court's decision newly recognizing a constitutional right, but on the date that decision is 'made' retroactive." 266 F.3d at 673. Because the court of appeals had not yet decided whether Apprendi was retroactively applicable, the court held, the limitations period had not yet begun to run.[3] Cf. In re Vial, 115 F.3d 1192, 1197 n.9 (4th Cir. 1997) ("Vial's assertion of a claim based upon a new rule of law implicated clause (3) of the limitation provision. And, since the Supreme Court has not yet ruled on the collateral availability of the rule in Bailey, the limitations period has not yet begun to

[3] In its later decision in Fischer v. United States, 285 F.3d 596 (2002), cert. denied, 537 U.S. 1114 (2003), the Seventh Circuit followed Ashley in a case arising from a Section 2255 motion raising a Richardson claim. The court explained that in Ashley, it had "held that the clock began to run once [the Seventh Circuit] declared a decision to apply retroactively," and because the prisoner's Section 2255 motion was filed before the date the Seventh Circuit held that Richardson was retroactive, it was timely filed. Id. at 600.

run.").

Finally, in Pryor v. United States, 278 F.3d 612 (2002), the Sixth Circuit joined those circuits in concluding that a motion is timely when it is filed within one year of a decision holding that the rule asserted is retroactively available to cases on collateral review. The prisoner in Pryor had filed a Section 2255 motion raising a Bailey claim in 1998, three years after this Court decided Bailey. Like the Seventh Circuit in Ashley, the court of appeals in Pryor was concerned primarily with the question whether the retroactivity determination could be made by the lower courts or only by the Supreme Court. The court concluded that it need not decide that issue, however, because "the Sixth Circuit had not decided whether Bailey was retroactively applicable to cases on collateral review" before the Supreme Court's decision in Bousley, and the prisoner's Section 2255 motion, which "was filed within one year of the Bousley decision, * * * was therefore timely." 278 F.3d at 616.

2. The division in the courts of appeals is not likely to be resolved without intervention by this Court.[4] Moreover, the one-year limitations period under 28 U.S.C. 2244(d)(1)(C) for state prisoners to file federal habeas petitions is almost identical to Section 2255 ¶ 6(3), and resolution of the question presented is therefore likely to have an affect on habeas petitions filed by

[4] Two circuits have noted the conflict, but have not themselves taken a position on the correct understanding of Section 2255 ¶ 6(3). See Sepulveda v. United States, 330 F.3d 55, 64 n.5 (1st Cir. 2003); Haugh v. Booker, 210 F.3d 1147, 1150 (10th Cir. 2000).

state prisoners as well. See In re Hearn, 376 F.3d 447, 456 n.11 (5th Cir. 2004). Restoring uniformity to the interpretation of a federal law is a valid basis for this Court to exercise its discretion to grant a petition for a writ of certiorari. See Sup. Ct. R. 10(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

ELIZABETH A. OLSON
Attorney

OCTOBER 2004

No. 04-5286

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL DONALD DODD, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES** by email and first-class mail, postage prepaid, this **20th day of October 2004**.

[See Attached Service List]

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Paul D. Clement
Acting Solicitor General
Counsel of Record

October 20, 2004

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov**. Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

04-5286
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USA

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No. 04-5286

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL DONALD DODD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

JOINT APPENDIX

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* Counsel of Record

PETITION FOR CERTIORARI FILED JULY 14, 2004
CERTIORARI GRANTED NOVEMBER 29, 2004

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(Miami)

Civil Docket Case No. 01-CV-1347

MICHAEL DONALD DODD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondents.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
4/4/01	1	COMPLAINT/Motion to Vacate, Set Aside or Correct Sentence pursuant to 28:2255 filed; Fee: waived; B-6; CHS (ea) [Entry date 04/05/01]
4/4/01	2	Clerk's Order of Magistrate Judge Assignment to Magistrate Charlene H. Sorrentino, re: Administrative Order (ea) [Entry date 04/05/01]
		• • •
4/13/01	4	ORDER TO PETITIONER TO RESPOND TO LIMITATIONS PERIOD on or before: 5/15/01 (Signed by Magistrate Judge Charlene H. Sorrentino on 4/13/01) CCAP [EOD Date: 4/16/01] (ea) [Entry Date 04/16/01]
		• • •

DATE	NO.	PROCEEDINGS
4/24/01	7	ORDER TO SHOW CAUSE why this motion should not be granted; Response to Order to Show Cause due 6/29/01 (Signed by Magistrate Judge Charlene H. Sorrentino on 4/24/01) CCAP [EOD Date 4/25/01] (ea) [Entry date 04/25/01]
		• • •
8/15/01	13	RESPONSE/ANSWER to 2255 motion/ Complaint by United States (sk) [Entry date 8/16/01]
		• • •
9/25/01	19	RESPONSE by Michael Donald Dodd in opposition to [1-1] COMPLAINT/Motion to Vacate, Set Aside or Correct Sentence pursuant to 28:2255, [4-1] order to respond to limitations period (sk)
10/15/01	20	MOTION by Michael Donald Dodd to amend/supplement record [1-1] complaint (proposed pleading not attached) (sk) [Entry date 10/16/01] [Edit date 10/16/01]
10/17/01	21	ORDER granting [20-1] motion to amend/ supplement record [1-1] complaint (Signed by Magistrate Judge Charlene H. Sorrentino on 10/16/01) [EOD Date: 10/18/01] (ea) [Entry date 10/18/01]
10/18/01	22	REPORT of Magistrate Judge Charlene H. Sorrentino Signed on: 10/18/01 recommending that this motion to vacate be dismissed as time-barred. Case no longer referred. Objections to R and R due by 10/29/01 CCAP (ea) [Entry date 10/19/01]

DATE	NO.	PROCEEDINGS
10/31/01	23	ORDER dismissing case (Signed by Judge Federico A. Moreno on 10/31/01) [EOD Date: 11/1/01] (sk) [Entry date 11/01/01]
		• • •
11/14/01	24	OBJECTION by Michael Donald Dodd to [22-1] report and recommendations (sk) [Entry date 11/15/01]
11/14/01	25	MOTION by Michael Donald Dodd to alter or amend [23-2] order dismissing case (judgment) (sk) [Entry date 11/15/01]
		• • •
7/29/02	29	MOTION by Michael Donald Dodd for leave to supplement and citation to supplemental authorities (1k) [Entry date 07/30/02]
		• • •
9/10/02	32	ORDER denying as moot [30-1] motion for leave to supplement and citation to supplemental authority, denying as moot [29-1] motion for leave to supplement and citation to supplemental authorities, denying [25-1] motion to alter or amend [23-2] order dismissing case (judgment). (Signed by Judge Federico A. Moreno on 9/2/02) [EOD Date: 9/11/02] (1k) [Entry date 09/11/02]
		• • •

DATE	NO.	PROCEEDINGS
11/5/02	34	NOTICE OF APPEAL by Michael Donald Dodd of [32-1] order, EOD Date: 9/11/02; [23-2] order EOD Date: 11/1/01; Filing Fee: $ FEE NOT PAID; Copies to USCA and Counsel of Record. (vl)
		• • •
11/5/02	34	MOTION by Michael Donald Dodd for certificate of appealability (vl)
		• • •
11/27/02	39	ORDER granting [35-1] motion for certificate of appealability, [34-1] motion for certificate of appealability (Signed by Judge Federico A. Moreno on 11/26/02) [EOD Date: 12/3/02] (nc) [Entry date 12/03/02]
		• • •

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
(Atlanta)

Civil Docket Case No. 02-16134-CC

MICHAEL DONALD DODD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondents.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/13/2002	HAB-1 (State Habeas/2255—docketing notice) issued. To: Dodd, Michael Donald cc: Clarence Maddox cc: Becerra, Jacqueline cc: Jiminez, Marcos D. cc: Schultz, Anne R.
	• • •
01/03/2003	Appellant Brief Filed: Appellant-Dodd, Michael Donald (ProSe)
	• • •
02/03/2003	Appellee Brief Filed: Appellee—United States of America (Atty: Lisette M. Reid)
02/14/2003	Reply Brief Filed: Appellant-Dodd, Michael Donald (ProSe)
	• • •
06/05/2003	On our own motion, we expand the district court's Certificate of Appealability . . . We ap-

DATE	PROCEEDINGS
	point the Federal Public Defender's Office as counsel to represent Dodd on appeal . . . . (see file for complete text) RB
	* * *
07/24/2003	Supplemental Appellant Brief: Appellant (Atty: Janice Bergmann)
	* * *
08/18/2003	Supplemental Appellee Brief: (Atty: Lisette M. Reid)
	* * *
09/04/2003	Supplemental Reply Brief: (Atty: Janice Bergmann)
11/05/2003	Oral Argument Scheduled: 11/05/03
	* * *
04/16/2004	Judgment Entered
	* * *
04/16/2004	Opinion Issued AFFIRMED.
	* * *
06/08/2004	Mandate Issued.
	* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 01-CV-1347

MICHAEL DONALD DODD,
Defendant,

v.

UNITED STATES OF AMERICA,
Respondent.

Name of Movant: Michael Donald Dodd

Prisoner No.: 09925-424

Case No. 93-304-CR-FAM

Place of Confinement: F.C.I. Talladega, 565 E. Renfroe Rd., PMB 1000, Talladega, Alabama 35160-8799.

MOTION

1. Name and location of court which entered the judgment of conviction under attack: United States District Court for the Southern District of Florida, Miami Division.
2. Date of judgment of conviction: July 28, 1995.
3 Length of sentence: Three Hundred Sixty (360) months on all counts.
4 Nature of offense involved (all counts): Count I: Engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848; Count II: Conspiring to possess with intent to distribute Marijuana in violation of 21 U.S.C. § 846: Count III: Conspiracy to possess with intent to distribute and to distribute cocaine in violation of 21 U.S.C. § 846; Counts IV-IXX: Knowingly use and possess a document for entry into the U.S. which the defendant knew had been procured by means of a false claim or statement in violation of 18 U.S.C. § 1546(a).

5. What was your plea? (Check One)

   (a) Not guilty ■
   (b) Guilty □
   (c) Nolo contendere □

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: Plead guilty to Count I of Indictment #94-183 CR-Moreno, conspiracy to tamper with a witness in violation of 18 U.S.C. § 371.

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

   (a) Jury ■
   (b) Judge only □

7. Did you testify at the trial?

   Yes □ No ■

8. Did you appeal from the judgment of conviction?
   Yes ■ No □

9. If you did appeal, answer the following:

   (a) Name of court: Eleventh Circuit Court of Appeals
   (b) Result: Affirmed
   (c) Date of result: May 7, 1997, rehearing denied July 11, 1997

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

    Yes □ No ■

* * * *

12.A. Ground one: The Petitioner was denied his Sixth Amendment right to a unanimous verdict on the CCE count.

Supporting FACTS (state briefly without citing cases or law): The jury was not instructed that in order to return a verdict of guilty on the CCE count that it must unanimously agree not only that the defendant committed some continuing series of violations but also unanimously agree that the defendant committed each of the individual violations necessary to make up that continuing series.

B. Ground two: The Petitioner's continued conviction under 21 U.S.C. § 848 violates his right to due process because he is actually innocent of that offense.

Supporting FACTS (state briefly without citing cases or law): The Petitioner was never found guilty beyond a reasonable doubt by a unanimous jury on the continuing series of drug violations element of 21 U.S.C. § 848.

C. Ground three: The Petitioner was denied the Sixth Amendment right to counsel at trial, at sentencing, and on appeal.

Supporting FACTS (state briefly without citing cases or law): (1) Defense counsel failed to submit jury instructions that the defendant could only be convicted of conspiracy or CCE, not both counts; (2) defense counsel failed to move upon return of the jury's verdict and at sentencing that the conspiracy conviction and sentence be vacated; (3) defense counsel failed to object at sentencing to the imposition of a general sentence that exceeded the maximum allowable sentence on counts two and four through nineteen; and (4) counsel failed to raise the above referenced issues on appeal.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting

them: The grounds listed in ¶ 12 A & B were not previously presented because they were not available in the Eleventh Circuit until the Supreme Court interpreted and clarified the elements of 21 U.S.C. § 848 in *Richardson v. United States*, 526 U.S. 813, 119 S. Ct. 1707, 143 L. Ed. 2d. 985 (1999). The grounds listed in ¶ 12c were not previously presented because they are based on ineffective assistance of counsel which cannot be raised at sentencing or appeal.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐ No ■

* * * *

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ■ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ■

Vacate the CCE conviction and remand for sentencing.

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

/s/ _____
Signature of Attorney (if any)

I declare under the penalty of perjury that the foregoing is true and correct. Executed on _____
(date)

/s/_____
Signature of Movant

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

[Filed Oct. 18, 2001]

CASE NO. 01-1347-CIV-MORENO
(93-304-CR-MORENO)

MAGISTRATE JUDGE SORRENTINO

MICHAEL DONALD DODD,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.

REPORT RE DISMISSAL OF § 2255 MOTION AS TIME-BARRED

This motion to vacate pursuant to 28 U.S.C. § 2255 was filed by the clerk on April 4, 2001. The judgment of conviction in the underlying criminal case, No. 93-304-Cr-Moreno, became final on or about August 7, 1997, when time expired for filing a petition for writ of certiorari.[1]

The government has invoked the statute of limitations. Pursuant to 28 U.S.C. § 2255, as amended April 24, 1996, a

---

[1] The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for writ of certiorari elapsed or a petition for certiorari finally denied. *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1986). Ordinarily, a petition for writ of certiorari must be filed within 90 days of the date of the entry of judgment rather than the issuance of a mandate. Sup.Ct.R. 13.

one year period of limitations applies to a motion under the section. The one year period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant is prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

A jury convicted Dodd of engaging in a criminal enterprise, conspiring to possess with intent to distribute cocaine and marijuana, and using a fraudulent document to gain entry into the United States. The Court sentenced him to 360 months imprisonment. Dodd's convictions and sentences were affirmed in an opinion entered on May 7, 1997. (DE# 144). He did not petition the Supreme Court for writ of certiorari, and his convictions became final on or about August 7, 1997, when time expired for doing so. He filed this motion to vacate well over one year later on April 4, 2001.

Dodd replied to the government's response, and argued that the motion is timely because it was filed within one year of the date that the Supreme Court issued *Apprendi v. New Jersey*, 530 U.S. 466 (2000) on June 26, 2000 and that the motion is based in part upon *Richardson v. United States*, 526 U.S. 813 (1999). He argues that both cases apply retroactively to cases on collateral review, and therefore defeat the statute

of limitations. Dodd also argues that the limitations period should be equitably tolled and the motion deemed to be timely filed, based upon the fact that he was transferred from the Institution where he is usually housed and where his papers were located.

It is initially noted that the Supreme Court did not newly recognize a right which is retroactively applicable to cases on collateral review in *Apprendi*, *supra*, and that the Eleventh Circuit has recently held that *Apprendi* does not apply retroactively to cases on collateral review. *See McCoy v. United States*, __ F.3d __, 2001 WL 1131653 (11 Cir. 2001).

Richardson, *supra* was decided in 1999, more than one year before this motion to vacate was filed. Thus Dodd's reliance upon *Richardson* does not overcome the statute of limitations.

The Eleventh Circuit has held that the limitations period may be equitably tolled when a movant's timely filing of a motion to vacate is impeded by extraordinary circumstances beyond his control and unavoidable even with due diligence. *Sandvik v. U.S.*, 177 F.3d 1269 (11 Cir. 1999).

Dodd has not demonstrated that the circumstances underlying the untimely filing of the motion to vacate are extraordinary or that the delay was unavoidable even with due diligence. His claims are based upon *Richardson*, *supra*, which was decided on June 1, 1999, four months before he was transferred from the correctional facility. After he was returned to the facility, he waited seven additional months before filing this motion to vacate. He has failed to demonstrate either that the state created an impediment which prevented his timely filing, or that extraordinary circumstances existed which entitle him to equitable tolling.

It is therefore recommended that this motion to vacate be dismissed as time-barred.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: October 18, 2001

/s/ Charlene H. Sorrentino
UNITED STATES MAGISTRATE JUDGE

cc: MICHAEL DONALD DODD, *Pro Se*
Reg. No. 09925-424
FCI - Talladega
565 East Renfroe Road
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Oct. 31, 2001]

CASE NO. 01-1347-CIV-MORENO
(93-304-CR-MORENO)
MAGISTRATE JUDGE SORRENTINO

MICHAEL DONALD DODD,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.

ORDER OF DISMISSAL MOTION TO VACATE

For the reasons stated in the Report of the Magistrate Judge and upon independent review of the file, it is

ORDERED AND ADJUDGED as follows:

1. This motion to vacate pursuant to 28 U.S.C. § 2255 is dismissed, as time barred.
2. All motions related to the civil case not otherwise ruled upon are dismissed, as moot.
3. The case is closed.

DONE AND ORDERED at Miami, Florida, this 31st day of October, 2001.

/s/ Frederico A. Moreno
UNITED STATES DISTRICT JUDGE

cc: MICHAEL DONALD DODD, *Pro Se*
JACQUELINE BECERRA, AUSA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT FILED

[Filed April 16, 2004]

No. 02-16134

D. C. Docket Nos. 01-01347-CV-FAM
and 93-00304 CR-FAM

MICHAEL DONALD DODD,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before TJOFLAT and MARCUS, Circuit Judges, and MUSGRAVE*, Judge. MARCUS, Circuit Judge:

Michael Donald Dodd, a federal prisoner, appeals the dismissal of his petition to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. Dodd claims that his conviction violated both the Sixth Amendment and the Due Process Clause because the district court failed to charge the jury that in order to find him guilty of engaging in a continuing criminal enterprise ("CCE"), in violation of 21 U.S.C. § 848,

* Honorable R. Kenton Musgrave, Judge, United States Court of International Trade, sitting by designation.

it had to find him guilty of each constituent violation by a unanimous vote. The district court dismissed Dodd's petition after adopting a Report and Recommendation from a magistrate judge which concluded that Dodd had failed to file his § 2255 application within the one-year statute of limitations applicable to such motions under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2255(1)-(4). After thorough review of the record and the parties' briefs, we find no reversible error and affirm.

I.

The factual background of this case is relatively straightforward, and we offer only the following brief summary of the relevant facts and procedural history. On June 25, 1993, a grand jury sitting in the United States District Court for the Southern District of Florida charged Dodd by superseding indictment with knowingly and intentionally engaging in a CCE, in violation of 21 U.S.C. §§ 841 and 846 ("Count I"); conspiring to possess with intent to distribute marijuana (as part of Count I's CCE), in violation of 21 U.S.C. § 841(a)(1) ("Count II"); conspiring to possess with intent to distribute cocaine (as part of Count I's CCE), in violation of 21 U.S.C. § 841(a)(1) ("Count III"); and sixteen counts of using and possessing a passport obtained by false statement, in violation of 18 U.S.C. § 1546(a) ("Counts IV-XIX"), arising out of his leadership role in the "Spangler Posse," a large Jamaican drug distribution network based in New York City, from the 1970's through at least the 1980's.

After trial by jury, Dodd was found guilty as to all counts except for Count III. The district court imposed a 360-month term of imprisonment, followed by five years of supervised release. On May 7, 1997, we affirmed his conviction on direct appeal. *See United States v. Dodd*, 111 F.3d 867 (11th Cir.

1997) (per curiam). Dodd did not petition the Supreme Court for certiorari, and his conviction became final on August 6, 1997, when the time for filing a petition for certiorari expired.[1]

On April 4, 2001, more than three years later, Dodd filed this § 2255 petition, arguing that his Sixth Amendment and due process rights were violated because the jury in his underlying criminal case was not instructed that to find him guilty of the CCE count, it had to find him guilty of each constituent violation by a unanimous vote. Dodd based his argument on the Supreme Court's June 1, 1999, decision in Richardson v. United States, 526 U.S. 813, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999) (holding that to find a defendant guilty on a CCE count, a jury must find the defendant guilty by a unanimous vote of each of the constituent violations of the CCE).

In its response to Dodd's petition, the government argued that Dodd's motion was time-barred, because it had been filed well beyond AEDPA's one-year limitations period.[2] While the government conceded that the date the statute of limitations begins to run for a *Richardson* claim is unsettled in this Circuit, it urges us to hold that AEDPA's one-year statute of limitations period began to run on June 1, 1999, the day the Supreme Court decided *Richardson*. Under these circumstances, Dodd's petition—filed almost two years later—plainly would be untimely unless the statute of limitations were somehow tolled.

Dodd responds that the one-year statute of limitations period for Richardson claims did not begin to run until April 19, 2002, when this Court made *Richardson* retroactively applicable to cases on collateral review in *Ross v. United States*, 289 F.3d 677 (11th Cir. 2002), *cert. denied*, 537 U.S. 1113, 123 S. Ct. 944, 154 L. Ed. 2d 787 (2003). If we adopt this date as the trigger for the statute of limitations, then any motion filed prior to April 19, 2003—including Dodd's—would be timely.

In the alternative, Dodd says that even if the limitations period began to run immediately after *Richardson* was decided, it should be equitably tolled from October 25, 1999, to September 11, 2000, during which time he was in custody of the U.S. Marshal, did not have access to his legal papers, and was impeded from filing his motion. On October 25, 1999, Dodd was transported from the federal correctional facility in Talladega, Alabama, where he maintained his legal papers, to the federal detention center in Miami, Florida, pursuant to a writ of habeas corpus ad testificandum issued by the United States Attorney for the Southern District of

---

[1] This Court has held that when a prisoner does not file a petition for certiorari, "within the meaning of § 2255 . . . the judgment becomes final on the date on which the defendant's time for filing such a petition expires." *Kaufmann v. United States*, 282 F.3d 1336, 1339 (11th Cir.) (internal quotation marks omitted), *cert. denied*, 537 U.S. 875, 123 S. Ct. 287, 154 L. Ed. 2d 127 (2002). Similarly, the Supreme Court has indicated that convictions become final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 712 n.6, 93 L. Ed. 2d 649 (1986). The period in which a petition for certiorari must be filed ordinarily ends ninety (90) days after the entry of judgment. Sup. Ct. R. 13. In this case, Dodd did not file a petition for certiorari, and his conviction became final 91 days after this Court affirmed his conviction on May 7, 1997.

[2] AEDPA provides, at 28 U.S.C. § 2255, paragraph 6:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . .
>
> . . . .
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]

Florida. During his time in Miami, Dodd's papers remained in Talladega. He was returned to Talladega on September 11, 2000.

Dodd filed his § 2255 motion approximately seven months later, on April 4, 2001. Subsequently, on October 18, 2001, the magistrate judge issued a Report and Recommendation concluding that Dodd's motion should be dismissed because (1) the motion was filed more than one year after the Supreme Court's decision in *Richardson*, and was thus time-barred, and (2) Dodd failed to demonstrate that the circumstances surrounding his late filing were extraordinary or could not have been overcome with due diligence. The district court adopted the magistrate judge's Report and Recommendation on October 31, 2001, and dismissed Dodd's motion as time-barred.

The district court granted Dodd a Certificate of Appealability on the issue of whether the limitations period should have been equitably tolled. This Court subsequently expanded the Certificate of Appealability to include the following issue:

> [F]or purposes of a newly recognized right, pursuant to 28 U.S.C. § 2255(3), does the one-year statute of limitations begin to run on the date the Supreme Court initially recognized the right, or does it begin on the date a court first held that the right is recognized retroactively on collateral review?

This question—regarding the date from whence the one-year limitations period of 28 U.S.C. § 2255(3) begins to run—has generated a split among our sister Circuits. Compare, *United States v. Lopez*, 248 F.3d 427, 432-33 (5th Cir. 2001) (concluding that limitations period begins to run on the date Supreme Court initially recognizes new right), *Nelson v. United States*, 184 F.3d 953, 954 (8th Cir. 1999) (same), *Triestman v. United States*, 124 F.3d 361, 371 n.13 (2d Cir. 1997) (stating same in dicta) and *Donaldson v. United States*, Nos. 01-CV-1061(NPM) & 92-CR-51-001, 2002 WL 1839213 at *4 (N.D.N.Y. Aug. 6, 2002) (following *Triestman*) with *Ashley v. United States*, 266 F.3d 671, 673-74 (7th Cir. 2001) (concluding that the limitations period begins to run on the date when the new right is declared to be retroactively applicable on collateral review), *United States v. Valdez*, 195 F.3d 544, 547-48 (9th Cir. 1999), *United States v. Lloyd*, 188 F.3d 184, 187-88 (3d Cir. 1999) (assuming that limitations period begins to run only after either Supreme Court's own retroactivity decision or decision by Court of Appeals declaring right retroactively available on collateral review within the relevant circuit), and *Berthoff v. United States*, 140 F. Supp. 2d 50, 59-60 (D. Mass. 2001) ("[T]his Court . . . believes the better interpretation of section 2255(3) is that the new limitations period should run from the date on which either the Supreme Court or the controlling circuit court holds the new right to be retroactive on collateral review.").

After thoroughly reviewing the record and the briefs, as well as the conflicting case law as to when the limitations period in § 2255(3) begins running, we affirm the dismissal of Dodd's § 2255 motion. In doing so, we join those circuits which have concluded that the limitations period in § 2255(3) is triggered on the date the Supreme Court initially recognizes a new right. We further hold that Dodd has failed to present sufficient evidence to support the application of the doctrine of equitable tolling, an "extraordinary remedy" which we apply only "sparingly." *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000)

II.

This Court reviews de novo a district court's determination "that a petition for federal habeas corpus relief was time-barred," *Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th

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Cir. 2002), as we review all issues concerning statutory interpretation. *Kaufmann*, 282 F.3d at 1337; *see also United States v. Hooshmand*, 931 F.2d 725, 737 (11th Cir. 1991). Likewise, we review de novo a "district court's determination that equitable tolling is inapplicable . . . ." *Steed*, 219 F.3d at 1300. However, a district court's determinations of the facts relevant to a petitioner's equitable tolling claim "will be reversed only if clearly erroneous. . . . This standard requires us to affirm a district court's findings of fact unless `the record lacks substantial evidence' to support that determination." *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1283 (11th Cir. 2002) (citing *Dorsey v. Chapman*, 262 F.3d 1181, 1185 (11th Cir. 2001) and quoting *Lightning v. Roadway Express, Inc.*, 60 F.3d 1551, 1558 (11th Cir. 1995)), *cert. denied*, 537 U.S. 1237, 123 S. Ct. 164, 155 L. Ed. 2d 205 (2003). "We have squarely held that a determination regarding a party's diligence is a finding of fact that `will not be disturbed unless clearly erroneous.'" *Id.* (quoting *Walters v. City of Atlanta*, 803 F.2d 1135, 1145 (11th Cir. 1986)).

III.

We address, first, whether the district court erred in determining that, for the purposes of a newly recognized right, pursuant to 28 U.S.C. § 2255(3), AEDPA's one-year statute of limitations begins to run on the date when the Supreme Court initially recognizes the right.

Subsection (3) of § 2255 provides that the statute's one-year period of limitation shall run from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]" 28 U.S.C. § 2255(3).

We have recognized, as have the other circuits, that *Richardson* established a newly created right within the meaning of

§ 2255(3). *See Ross*, 289 F.3d at 681; *see also Santana-Madera v. United States*, 260 F.3d 133, 139 (2d Cir. 2001); *Lopez*, 248 F.3d at 432; *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000). Indeed, the government has expressly conceded this point. Appellees' Brief at 6 ("Dodd is correct in his assertion that the Supreme Court recognized a new right in *Richardson*.").

There is likewise no doubt that the new right announced in *Richardson* is retroactively available on collateral review. *See Ross*, 289 F.3d at 681 (11th Cir. 2002). Neither party contends that § 2255(3) requires that the retroactivity decision be made by the Supreme Court; rather, any court may do so. As a panel of this Court noted, every circuit to consider this issue has held that a court other than the Supreme Court can make the retroactivity decision for purposes of § 2255(3). *Garcia v. United States*, 278 F.3d 1210, 1213 n.4 (11th Cir.) (citing *Lopez*, 248 F.3d at 431; *Ashley*, 266 F.3d at 673-74), cert. denied, 537 U.S. 895, 123 S. Ct. 180, 154 L. Ed. 2d 163 (2002);[3] *see also United States v. Swinton*, 333 F.3d 481, 487

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[3] In Garcia, a panel of this Court recognized but did not decide the issue of when the § 2255(3) limitations period begins to run. *See* 278 F.3d at 1213 n.5. In that case, we identified the question as "whether the one-year limitation period begins to run on the date on which the right is initially recognized by the Supreme Court, or the date on which it is held retroactively applicable by the court of appeals or the Supreme Court[,]" and observed that:

> [t]here is a split among the circuits on how these questions should be answered. . . . It might present a problem to conclude *both* that the limitation begins to run when the Supreme Court initially recognizes the right *and* that a petitioner may not rely on that right until there is controlling circuit authority holding the right retroactively applicable to cases on collateral review, because in that case the opportunity for review offered by § 2255(3) would largely evaporate: as previously noted, it often happens that more than a year elapses before a right newly recognized by the Supreme Court is held to be retroactively applicable by an appellate court. In light of the circuit split and the absence of controlling

(3d Cir.) ("We conclude—and the parties agree—that the statute of limitations provision of § 2255 allows district courts and courts of appeals to make retroactivity decisions."), *cert. denied*, 124 S. Ct. 458, 157 L. Ed. 2d 330 (2003).[4]

While Dodd's motion meets the substantive requirements of § 2255(3) —it is based on a new right identified by the Supreme Court in *Richardson* made retroactively applicable to cases on collateral review—the critical question remains whether his motion is timely. To state the issue in more specific terms, since Dodd filed his motion on April 4, 2001, it would not be timely if the one-year limitations period in § 2255(3) began to run on June 1, 1999, when the Supreme Court first recognized the new right by deciding *Richardson*. If, however, the statute of limitations did not begin to run until April 19, 2002, when this Court held in *Ross* that the newly created *Richardson* right was retroactively available on collateral review, then Dodd's motion was timely filed well before the limitations period ended on April 19, 2003.

> authority in this Circuit, prudent petitioners will treat the earlier date—the date on which the right is newly recognized by the Supreme Court—as the date on which the one-year limitation period begins to run.

278 F.3d at 1213 n.5.

[4] The Fourth Circuit interpreted § 2255 in a case involving a second or successive habeas petition, noting in a footnote that "since the Supreme Court has not yet ruled on the collateral availability of the rule . . . the limitations period has not yet begun to run," *In re Vial*, 115 F.3d 1192, 1197 n.9 (4th Cir. 1997) (*en banc*). As we noted in *Garcia*, however, that case involved a second or successive petition, rather than an initial petition, as in the instant case. *See Garcia*, 278 F.3d 1210, 1213 n.4. The section of law pertinent to second or successive petitions explicitly requires the retroactivity determination to be made by the Supreme Court, stating that a court of appeals may authorize a second or successive application if it would rest on "a new rule of constitutional law, *made retroactive to cases on collateral review by the Supreme Court*, that was previously unavailable." 28 U.S.C. § 2255 ¶ 8 (2) (emphasis added).

We begin with the plain language of the statute in question. *See Harris v. Gamer*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc) (noting that "courts should always begin the process of legislative interpretation, and . . . often should end it as well, . . . with the words of the statutory provision."). Here, as the Second Circuit noted, "the statute provides that the limitations period begins to run on `the date on which the right asserted was *initially* recognized by the Supreme Court,' 28 U.S.C. § 2255 (emphasis added), which may be different from the date on which the right is later made retroactively available to cases on collateral review." *Triestman*, 124 F.3d at 371 n. 13. There is no reason to read the unambiguous term "initially" as signifying anything other than its common-sense and ordinary meaning of "from the beginning." *See Webster's Third New International Dictionary* 1164 (1961) (defining "initially" to mean "in the first place" and "at the beginning"). *See also In re Griffith*, 206 F.3d 1389, 1393 (11th Cir. 2000) (en banc) ("In interpreting the language of a statute, we generally give the words used their ordinary meaning." (internal quotation marks and citations omitted)).

If the one-year limitation period runs *only* from the date on which the Supreme Court *initially* recognized the new right, we must determine the purpose of the qualifying clause that follows: "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(3). It would not be logical for Congress to have enacted a strict one-year time limitation and then qualified that time frame by reference to ambiguous events. Rather, we believe Congress was simply reiterating the obvious: that § 2255(3) provides a narrow exception which can be relied upon only when the new right recognized by the Supreme Court can be retroactively applied

on collateral review. Thus, the second clause in § 2255(3) qualifies the right asserted—not the time limit.[5]

Put simply, if Congress intended the limitations period to begin running when a right was made retroactive, it could easily have said the limitation period shall run from the date on which a right newly recognized by the Supreme Court has been made retroactively applicable on collateral review. Instead, Congress has written that "[t]he limitation period shall run from . . . the date on which the right asserted was *initially* recognized by the Supreme Court . . . ." 28 U.S.C. § 2255(3) (emphasis added). There is no reason to believe that Congress intended this unequivocal phrase to mean anything other than what it says. *See United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (*en banc*) ("[W]e must presume that Congress said what it meant and meant what it said." (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391 (1992))).

We turn then to the problem that a panel of this Court recognized in *Garcia*: that the opportunity for review presented by § 2255(3) would disappear if, at the same time we concluded that the limitation period begins to run when the Supreme Court initially recognizes the right, we also determined that a petitioner could not rely on that right until there is controlling circuit authority holding the right retroactively available. *Garcia*, 278 F.3d at 1213 n.5; *see also Ashley*, 266 F.3d at 673-74 (under such an interpretation, § 2255(3) would be a "mirage," given that more than a year can elapse between Supreme Court decision and retroactivity ruling).

[5] As the Fifth Circuit noted, "[t]he portion of § 2255(3) that triggers [the] limitations period contains the phrase 'right asserted.' Subsequently, 'that right' is limited by the retroactivity requirement. Therefore the retroactivity on collateral review aspect is not *contained within* the term 'right[,]'" Lopez, 248 F.3d at 433 (emphasis added), but rather qualifies and limits it.

While our holding today embraces the former proposition, we explicitly reject the latter.

Implicit in the conclusion that *any* court may make the retroactivity decision is the necessary inference that a petitioner *need not* wait for a controlling decision before filing his petition. Because a petitioner need not wait for the Supreme Court to address the issue of retroactivity, he may assert a claim in a district court as soon as a new right is recognized by the Supreme Court—in the hope, of course, that the district court will find the new right retroactively available on collateral review. *See Swinton*, 333 F.3d at 487 ("the statute of limitations provision of § 2255 allows district courts and courts of appeals to make retroactivity decisions."). Under this interpretation, therefore, a petitioner may file a § 2255(3) motion *immediately* after the Supreme Court decision announcing the right upon which the motion is based.

As a result, our analysis favors petitioners hoping to benefit from new rules announced by the Supreme Court. In cases based on *Richardson* rights, under our analysis, a petitioner could have filed a § 2255(3) motion immediately after the decision, or as early as June 2, 1999. Under the interpretation urged by Dodd, however, where the limitations period is not triggered until the right is made retroactively applicable, petitioners in this Circuit would have had to wait to file until this Court decided *Ross* in April 2002, meaning that prisoners would have to sit on their rights for almost three years. And in other circuits, where even more time elapsed before a decision on retroactivity was made, the wait could be even longer. Finally, if all petitioners faithfully awaited a retroactivity decision before asserting their rights—a situation theoretically possible if not practically imaginable—the Supreme Court and the circuits might never have occasion to make a retroactivity decision and the one-year window for filing a § 2255(3) motion might *never* open.

Moreover, Dodd's argument loses much of its force when we observe that in his own case he did not stand idly by for the three years before *Ross* was decided: indeed, Dodd filed his motion more than a year before that decision. Here, Dodd's actions speak louder than his words, and suggest that, at bottom, his argument really is that a petitioner may file a § 2255(3) motion beginning immediately after the Supreme Court announces a new right, *and* at any time up until one year after the first retroactivity decision is handed down. For motions relying on *Richardson* in this Circuit, then, Dodd effectively urges a limitations period of nearly four years, from June 1, 1999, when *Richardson* was decided, until April 19, 2003, a year after the *Ross* decision. This putative four-year period of limitations—a period which could be significantly longer in many circumstances—cannot be squared with AEDPA's unambiguous intention to bring certainty to this area of the law, and to give petitioners but a single year in which to file their claims.

Moreover, if we adopted Dodd's analysis and concluded that the limitations period in § 2255(3) did not begin to run until controlling circuit authority held a right retroactively applicable to cases on collateral review, this would yield not only different start dates in different jurisdictions, but also would result in uncertain limitations periods throughout the nation. The limitations period in each federal circuit could have a different start date, depending on when the retroactivity issue was decided there. In different circuits, petitioners would have to sit on their hands for different lengths of time, unable to assert their claims until after a retroactivity decision was made for the one-year window of opportunity to open.[6]

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[6] We note further that, even within a single circuit, retroactivity decisions by different district courts would arguably trigger the limitations period at different times, injecting still further uncertainty into the determination of the appropriate limitations period. Moreover, more than a year might often elapse between the time a district court initially found a new right retroactively available on collateral review and the time the circuit court reviewed that decision.

Alternatively, if the period began immediately after the Supreme Court decision and lasted until a year from the first retroactivity decision, each circuit would effectively have a different statute of limitations, many of which could stretch on for years. *See Lopez*, 248 F.3d at 433 (noting that if the limitations period only begins with the retroactivity decision, multiple situations could arise in which "the limitations period would never be triggered, and any petitioner's out-of-time motion would be timely, a likely unintended consequence by Congress."). So unpredictable and inconsistent a result would neither further the interest of judicial efficiency nor be consonant with the intent of a statute which, on its face, plainly aims to establish a single, uniform statute of limitations.

Because we interpret the limitations period according to its plain language, and consistently with the policy choices underlying AEDPA, we conclude that the one-year window of opportunity in which Dodd could have timely filed a habeas petition asserting the right recognized in *Richardson* opened on June 1, 1999, when that case was decided, and closed one year later. Since Dodd did not file his § 2255 motion until April 4, 2001 (almost three years later), the district court properly determined that it was time-barred, unless the statute of limitations was equitably tolled.

IV

We are unpersuaded by Dodd's alternative argument that the district court erred in concluding that he was not entitled to "equitable tolling."[7]

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[7] In addition to arguing for equitable tolling, Dodd also suggested in the district court that his motion was timely based on 28 U.S.C. § 2255(2),

Dodd says that even if we hold that the limitations period embodied in § 2255(3) began to run immediately after the *Richardson* decision, his motion is still timely because of equitable tolling from October 25, 1999 to September 11, 2000. Dodd explains that 146 days elapsed between the *Richardson* decision on June 1, 1999, and his transfer from Talladega on October 25, 1999, and that 205 days elapsed between his return to Talladega on September 11, 2000, and the time he filed his motion on April 4, 2001. Thus, Dodd argues, if the statute of limitations were tolled during the time Dodd was away from Talladega, only 351 days (146 + 205 days) would have elapsed from the date of the *Richardson* decision to Dodd's filing, bringing his motion within the one-year limitations period. *See Knight v. Schofield*, 292 F.3d 709, 712 (11th Cir. 2002) (explaining that "the clock is stopped while tolling is in effect").

Dodd also says that during the period after his return to Talladega, he spent considerable time trying to obtain documentation, and that the government would not provide him with the necessary material until he filed suit under the Freedom of Information Act, 5 U.S.C. § 552. Dodd seems to suggest,

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which provides that the one-year statute of limitations begins after "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed." This issue is beyond the scope of Dodd's Certificate of Appealability ("COA"), and therefore not properly reviewed by this Court. *See Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998) ("[W]e hold that in an appeal brought by an unsuccessful habeas petitioner, appellate review is limited to the issues specified in the COA."). Moreover, even if the issue were properly before us, Dodd's contentions would still fail. As a panel of this Court held in *Akins v. United States*, in order to prevail under § 2255(2), an alleged governmental impediment must be unconstitutional, one that is "not 'reasonably related to legitimate penological interests.'" 204 F.3d 1086, 1090 (11th Cir. 2000) (citation omitted). Dodd does not argue that his time spent in the custody of the U.S. Marshal in Miami was unconstitutional, and thus, this detention cannot support a claim under § 2255(2).

therefore, that his motion was filed as swiftly as was possible under the circumstances. He does not contend, however, that he made any attempt to have his legal papers forwarded to him while he was in Miami.

The government responds that equitable tolling is not applicable here, given the nearly five months Dodd had to file a motion based on *Richardson* before his transfer to Miami *and* the seven additional months he spent after his return to Talladega before filing his motion. Thus, the government urges, Dodd has not shown that his untimely filing was due to extraordinary circumstances beyond his control and otherwise unavoidable even with due diligence.

While equitable tolling is an "extraordinary remedy which is typically applied sparingly," *Steed*, 219 F.3d at 1300, it "can be applied to prevent the application of AEDPA's statutory deadline when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition." *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1312 (11th Cir. 2001); *see also Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (holding that the limitations period may be equitably tolled where "a movant untimely files because of *extraordinary circumstances* that are both beyond his control and unavoidable even with diligence" (emphasis added)). "The burden of establishing entitlement to this extraordinary remedy plainly rests with the petitioner." *Drew*, 297 F.3d at 1286. To establish diligence, then, the petitioner must present evidence showing reasonable efforts to timely file his action. *Id.* at 1287-89.

In *Akins*, a panel of this Court held that equitable tolling was inapplicable for periods of various lockdowns or during a period in which the movant's legal papers were misplaced by the prison. 204 F.3d at 1089-90. It is true that the facts of *Akins* are distinguishable from the case at hand, as the § 2255 movant there had failed to act for four years prior to the enactment of AEDPA, at least seven months after he obtained

a transcript which he deemed necessary to his case, and at least six months after the enactment of AEDPA. Nonetheless, *Akins* suggests that lockdowns and periods in which a prisoner is separated from his legal papers are not "extraordinary circumstances" in which equitable tolling is appropriate.

While Dodd contends that the limitations period in § 2255(3) should have been tolled during the period he was detained in Miami and did not have access to his papers, we cannot discern sufficient evidence in this record to establish that the circumstances were truly extraordinary. Dodd does not suggest, let alone argue that his detention was unconstitutional or somehow inappropriate, or that the transfer of a prisoner from one facility to another is anything but a routine practice.

Nor has Dodd shown that he acted with the diligence required to render equitable tolling appropriate to this case. Following the *Richardson* decision, Dodd had nearly *five* additional months with no impediments to stop him from preparing or filing a § 2255 motion. Moreover, Dodd has presented no evidence to show that, while he was in custody in Miami, he made any request to have his papers delivered to him,[8] attempted to contact counsel to assist him with timely filing his motion, or otherwise undertook any action that

[8] On appeal, Dodd's counsel asserts that Dodd was prevented from taking his legal materials with him to Miami "[p]ursuant to a policy of the Federal Bureau of Prisons," thus apparently implying that his failure to exercise diligence in requesting his legal papers should be excused for futility. Appellant's Brief at 24. However, Dodd's counsel does not direct our attention to such a policy, citing only an Inmate Personal Property Record—an inventory of his property stored at Talladega—appended as an exhibit to Dodd's Reply to the Government's Response to his § 2255 Motion. Notably, in his Reply, Dodd cites this exhibit only to prove that his files remained in Talladega, not that they were maintained there, against his wishes, pursuant to a particular policy. The unsupported suggestion of futility, without more, is insufficient to defeat the diligence required in this context. Nor would this period excuse the failure to act for the seven months *after* he was returned to Talladega.

would suggest reasonable diligence under the circumstances. Indeed, Dodd has not claimed that he made any specific efforts to file his motion within the established limitations period, either in the five months before he was transferred to Miami or in the *seven* months after his return to Talladega.

Simply put, Dodd has not shown with any degree of particularity what efforts he made that would even arguably constitute an appropriate degree of diligence for someone in his situation. Nor, finally, has he demonstrated why, if he had acted with the diligence plainly required to trigger the doctrine of equitable tolling, he could not have filed within the one-year period. Quite simply, we cannot conclude that the district court's finding that Dodd failed to demonstrate due diligence was clearly erroneous, and, as a result, Dodd's "lack of diligence bars us from reaching out and granting the rare and extraordinary remedy of equitable tolling." *Drew*, 297 F.3d at 1290 n.5.

V.

Accordingly, we hold today that, for the purposes of a newly recognized right under 28 U.S.C. § 2255(3), the one-year statute of limitations begins to run on the date the Supreme Court *initially* recognizes the right. As a result, Dodd's § 2255 motion, filed nearly two years after the Supreme Court initially recognized the new right in *Richardson*, is barred by the applicable one-year limitations period. Moreover, Dodd is not entitled to equitable tolling of the limitations period because he has shown neither extraordinary circumstances nor the diligence necessary to toll the statute. It follows that the district court did not err in dismissing Dodd's § 2255 motion as untimely.

AFFIRMED.

(5)

Supreme Court, U.S.
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No. 04-5286

IN THE

Supreme Court of the United States

MICHAEL DONALD DODD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

A federal prisoner may file a motion to vacate sentence under 28 U.S.C. § 2255 para. 6(3) within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

The Question Presented is:

Does the one-year period of limitation in paragraph 6(3) begin to run on the date that this Court initially recognizes the right asserted, regardless of whether the right has been newly recognized or made retroactively applicable to cases on collateral review, or does it begin to run on the date on that a prisoner can show that all three of its prerequisites have been established; that is, that the right asserted "was initially recognized" by this Court, "has been newly recognized" by this Court, and "made retroactively applicable to cases on collateral review?"

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IN THE

Supreme Court of the United States

No. 04-5286

MICHAEL DONALD DODD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is published. *Dodd v. United States*, 365 F.3d 1273 (11th Cir. 2004). JA 16-33. The final judgment of the United States District Court is unpublished, JA 15, as is the report and recommendation of the United States Magistrate Judge, JA 11-14.

JURISDICTION

The court of appeals entered its judgment on April 16, 2004. Mr. Dodd filed his petition for writ of certiorari on July 14, 2004, and this Court granted the petition on November 29, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Paragraph 6 of 28 U.S.C. § 2255 provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 para. 6.

STATEMENT

Petitioner Michael Donald Dodd seeks a new trial based upon *Richardson v. United States*, 526 U.S. 813 (1999). *Richardson* fundamentally changed the way juries decide cases involving the key charge that Mr. Dodd was convicted of: engaging in a continuing criminal enterprise. Mr. Dodd's jury did not make the findings that *Richardson* requires. Before a court may adjudicate the merits of Mr. Dodd's *Richardson* claim, however, this Court must resolve whether he timely filed his collateral challenge to his conviction before the one-year period for doing so expired.

The resolution of that question requires the Court to consider closely the language of the statute of limitations enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. 104-132, 110 Stat. 1214 (1996). The AEDPA established a "1-year period of limitation" for federal prisoners to file motions to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2255 para. 6. The one-year period runs from the "latest of" four dates listed in paragraph 6 of section 2255. In the vast majority of cases, the one-year period begins to run from "the date on which the judgment of conviction becomes final." § 2255 para. 6(1).

The three other dates listed in paragraph 6 reflect Congress' decision to allow collateral litigation well after finality in certain exceptional circumstances. This case involves the exception found in paragraph 6(3) of section 2255. It starts the one-year period on "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." § 2255 para. 6(3).

Eleven courts of appeal have considered paragraph 6(3)'s language and reached markedly divergent results.[1] If a court of appeals in the majority had decided Mr. Dodd's case, the one-year period under paragraph 6(3) would not begin to run until April 19, 2002, when the Eleventh Circuit held in *Ross v. United States*, 289 F.3d 677 (11th Cir. 2002), *cert. denied*, 537 U.S. 1113 (2003), that *Richardson* recognized a new right that applies retroactively to cases on collateral review. *See Pryor v. United States*, 278 F.3d 612, 616 (6th Cir. 2002); *Ashley v. United States*, 266 F.3d 671, 674 (7th Cir. 2001);

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[1] The First and Tenth Circuits have noted the circuit split, but declined to take sides. *See Sepulveda v. United States*, 330 F.3d 55, 65 n.5 (1st Cir. 2003); *Haugh v. Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000).

United States v. Valdez, 195 F.3d 544, 548 (9th Cir. 1999); *United States v. Lloyd*, 188 F.3d 184, 187-88 (3d Cir. 1999); *In re Vial*, 115 F.3d 1192, 1197 n.9 (4th Cir. 1997) (*en banc*).

The Eleventh Circuit, however, adopted the minority's interpretation of paragraph 6(3)'s language, and held that the one-year limitation period began to run on June 1, 1999, the date this Court decided *Richardson*. *See* JA 21; *United States v. Lopez*, 248 F.3d 427, 433 (5th Cir. 2001); *Nelson v. United States*, 184 F.3d 953, 954 (8th Cir. 1999); *Triestman v. United States*, 124 F.3d 361, 371 & n.13 (2d Cir. 1997) (dicta). Because Mr. Dodd filed his section 2255 motion more than a year after *Richardson*, the Eleventh Circuit concluded that the motion was time-barred, and declined to address the merits of his *Richardson* claim. JA 21, 29.

A. The Trial, Sentencing, and Direct Appeal Proceedings.

Following a trial in the United States District Court for the Southern District of Florida, a jury acquitted Mr. Dodd of conspiring to distribute cocaine, one of the predicate acts of a continuing criminal enterprise ("CCE"), but nonetheless convicted him of the CCE violation. *See* 21 U.S.C. § 841 & 846. The jury also convicted Mr. Dodd of conspiring to distribute marijuana in violation of 21 U.S.C. § 841(a)(1), and using and possessing a passport obtained by false statement in violation of 18 U.S.C. § 1546(a). The district court imposed a sentence of imprisonment of 360 months, to be followed by five years of supervised release. JA 17. Mr. Dodd's 360-month sentence is driven by the 20-year mandatory minimum term applicable to CCE convictions. *See* 21 U.S.C. § 848 (1995).

Mr. Dodd timely appealed. In a published opinion issued on May 7, 1997, the Eleventh Circuit affirmed Mr. Dodd's conviction. *United States v. Dodd*, 111 F.3d 867 (11th Cir. 1997) (*per curiam*). Mr. Dodd did not petition this Court

for a writ of certiorari, and his conviction became final on August 6, 1997, when the time expired for filing a certiorari petition. *See Clay v. United States*, 537 U.S. 522 (2003).

B. This Court Decides *Richardson v. United States*.

Nearly two years after Mr. Dodd's conviction became final, on June 1, 1999, this Court held that "a jury has to agree unanimously about which specific violations make up the 'continuing series of violations'" of a CCE charge. *Richardson v. United States*, 526 U.S. 813, 815 (1999).

C. The Section 2255 Proceedings in the District Court.

On April 4, 2001, Mr. Dodd filed a *pro se* motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. JA 7-10. Mr. Dodd argued, *inter alia*, that he was entitled to relief under *Richardson* because the district court failed to instruct his jury that they had to agree unanimously that he was guilty of each of the violations that made up the series of CCE violations. JA 9. The district court referred the motion to a magistrate judge, who ordered Mr. Dodd to file a memorandum explaining why his motion was not time-barred. 4/13/01 Order at 2. The magistrate judge also ordered the Government to show cause why Mr. Dodd's motion should not be granted. 4/21/01 Order.

In its response, the Government conceded that Mr. Dodd's jury "was not instructed to reach a unanimous decision with respect to the individual violations—an instruction that would now be required under *Richardson* but that was not the status of the law at the time of the Movant's trial." Government's Response to Movant's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 at 3. The Government, however, contended that the court did not have to grant relief because, in its view, Mr. Dodd's motion did not comply with the one-year limitation period applicable to section 2255 motions. *Id.* Mr. Dodd replied, *inter alia*, that his motion

was timely under paragraph 6(3) of section 2255. Petitioner's Reply to Government's Response to Movant's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 and Response to Order to Respond Regarding Limitations Period at 6-11.

On October 18, 2001, the magistrate judge issued a report recommending that the district court dismiss the motion as untimely. JA 11-14. Specifically, the magistrate judge concluded that Mr. Dodd could not rely upon paragraph 6(3) of section 2255 because he filed his motion more than one year after this Court decided *Richardson*. JA 13.

On October 31, 2001, before the time had run for Mr. Dodd to file objections to the magistrate judge's report, the district court summarily adopted the report in full and dismissed the motion. JA 15. On November 14, 2001, Mr. Dodd timely filed a motion to alter or amend the judgment asking the district court to, at the very least, consider his timely-filed objections to the magistrate judge's report. Petitioner's Motion to Alter or Amend Judgment.

On April 19, 2002, while Mr. Dodd's section 2255 proceeding remained pending before the district court, the Eleventh Circuit held that *Richardson* recognized a new right that applies retroactively to cases on collateral review. *Ross v. United States*, 289 F.3d 677 (11th Cir. 2002), *cert. denied*, 537 U.S. 1113 (2003). On July 29, 2002, Mr. Dodd notified the district court of the decision in *Ross*, and argued that his section 2255 motion was timely under paragraph 6(3) because the one-year limitation period did not begin to run until the Eleventh Circuit held in *Ross* that *Richardson* applied retroactively to collateral cases. Petitioner's Motion for Leave to Supplement and Citation to Supplemental Authorities at 12.

On September 10, 2002, the district court denied both Mr. Dodd's motion to alter or amend judgment and his motion for leave to supplement. 9/10/02 Order. The district court's order did not mention *Ross*. *Id.*

D. The Court of Appeals' Decision.

Mr. Dodd timely appealed, arguing that the limitation period did not begin to run until the Eleventh Circuit held in *Ross* that *Richardson* applies retroactively to collateral cases. The Government disagreed, and argued that the limitation period began to run on the date this Court decided *Richardson*. The court of appeals acknowledged a circuit split over the issue, but joining the minority of its sister circuits, adopted the Government's reading of paragraph 6(3), and affirmed the district court. JA 20-21.

The court of appeals based its decision on three determinations, the first two of which were not contested by the parties. First, the court determined that in *Ross*, it held both that *Richardson* "established a newly created right" within the meaning of paragraph 6(3), and "that the new right announced in *Richardson* is retroactively available on collateral review." JA 21, 23. Second, the court determined that unlike the provisions governing second or successive section 2255 motions, which expressly require this Court to make the retroactivity decision, paragraph 6(3) does not "require[] that the retroactivity decision be made by the Supreme Court; rather, any court may do so." JA 23. *Cf.* 28 U.S.C. § 2255 para. 8.

The parties disagreed below, and continue to do so here, over the Eleventh Circuit's third determination. Specifically, the parties' disagreement centers on the court of appeals' holding that paragraph 6(3) begins to run on the date this Court initially recognizes the asserted right. JA 21. The court of appeals reached this conclusion by reading the plain language of the statute to "provide[] that the limitations period begins to run on 'the date on which the right asserted was *initially* recognized by the Supreme Court.'" JA 25 (quoting *Triestman*, 124 F.3d at 371 n. 13). Applying this interpretation of paragraph 6(3) to the facts of Mr. Dodd's case, the court of appeals determined that because Mr. Dodd's motion

was filed more than a year after this Court's decision in *Richardson*, it was time-barred. JA 29.

SUMMARY OF ARGUMENT

Paragraph 6(3) states that the one-year period of limitation shall run from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." It contains three distinct prerequisites: first, that the right asserted "was initially recognized" by this Court; second, that the right "has been newly recognized" by this Court; and third, that the right has been "made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255 para. 6(3). Moreover, because Congress phrased these prerequisites in the past tense, they refer to events that had to have happened before the limitation period begins to run. Accordingly, the one-year limitation period begins to run when all three of paragraph 6(3)'s prerequisites have been satisfied.

Paragraph 6(3)'s placement and purpose in the AEDPA also compel the conclusion that all three of its prerequisites must be satisfied before the limitation period begins. Although one clear purpose of the AEDPA is respect for the finality of criminal judgments, Congress nonetheless enacted as part of the AEDPA a number of provisions, including paragraph 6(3), to provide prisoners in certain circumstances the opportunity for relief well past the date of finality. Specifically, the AEDPA amended section 2255 to give a federal prisoner the ability to obtain relief on a claim premised on a new decision of this Court that has been held to apply retroactively to collateral cases, even if the claim arose years after finality, and even, in some circumstances, if the prisoner has filed prior motions for relief. *See* § 2255 paras. 6(3) & 8(2).

Congress' decision to afford prisoners the benefit of rights that have been held retroactively applicable is not surprising. A new decision of this Court does not apply retroactively unless it involves important rights. Such decisions include those that interpret criminal statutes in a way that narrows the scope of the statute's application, *see Bousley v. United States*, 523 U.S. 614, 620-21 (1998), prohibit "'a certain category of punishment for a class of defendants because of their status or offense,'" *Graham v. Collins*, 506 U.S. 461, 477 (1993) (quoting *Saffle v. Parks*, 494 U.S. 484, 494 (1990)), or supply "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 478 (quoting *Saffle*, 494 U.S. at 495). This Court must, therefore, consider Congress' decision to allow prisoners to adjudicate the merits of these important rights when interpreting paragraph 6(3).

Congress' decision to allow prisoners to benefit from new rights made retroactively applicable is served by interpreting paragraph 6(3) to begin to run on the date that all three of its requirements have been established. First, this interpretation allows for the realistic possibility of second or successive motions premised on a new rule of constitutional law. Paragraph 6(3) governs the time for filing second or successive motions as well as initial motions, and must be read together with the stringent gateway procedures governing such motions. Specifically, section 2255 allows a second or successive motion premised on a new rule of constitutional law, but only if the prisoner can show that "this Court already had made" that rule retroactive. *See Tyler v. Cain*, 533 U.S. 656 (2001). Starting the one-year period under paragraph 6(3) when all three of its requirements have been established provides prisoners with the ability to obtain relief on such motions. *See id.* at 677 (Breyer, J., dissenting) (noting that opportunity for relief on second or successive motions "will remain open only if the relevant statute of limitations is interpreted to permit its 1-year filing period to run from the

time that this Court has 'made' a new rule retroactive, not from the time it initially recognized that new right").

Second, reading paragraph 6(3) to run from the date all three of its requirements have been established allows for the possibility that the lower courts might incorrectly determine that a right initially recognized by this Court does not apply retroactively to collateral cases. If a court of appeals incorrectly determines that the right does not apply retroactively, the limitation period will not yet have begun to run because all three prerequisites in the statute have not been met. If this Court later determines that the right indeed has retroactive effect, the limitation period will begin to run, and the lower court's mistake will not affect the ability to obtain relief. It therefore advances Congress' intent to give prisoners the benefit of new rights that apply retroactively to collateral cases.

Finally, the majority's interpretation of paragraph 6(3) comports with the purpose of the AEDPA to discourage prisoners from filing frivolous applications for collateral relief. It allows a prisoner the opportunity to make an informed decision about whether to file a section 2255 motion premised upon a new decision of this Court, and the likelihood of any such motion's success, without the concern that by doing so he risks all opportunity to obtain relief under that decision.

Some courts, including the court below, have held that the new limitation period in paragraph 6(3) should always run from the date a right "was initially recognized" by this Court, regardless of whether the right "has been newly recognized" or "made retroactively applicable." This interpretation renders superfluous the twenty words that comprise the second clause of paragraph 6(3), and fails to respect Congress' use of the past tense in defining the statutory requirements.

The minority's interpretation would also unfairly bar prisoners from benefitting from decisions of this Court that have been applied retroactively to collateral cases, even though

Congress clearly intended the contrary result. Starting the one-year limitation period on the date a right is initially recognized would vitiate Congress' decision to allow second or successive motions premised on a new rule of constitutional law that this Court has made retroactive. This is so because the limitation period will have run long before a case can reach this Court in a posture that would allow it to make the retroactivity ruling.

Moreover, adoption of the minority view could result in prisoners in some circuits obtaining relief on the merits, while affording those in other circuits no relief. If a court of appeals determines that a right does not apply retroactively, and certiorari is denied, but this Court later determines that the right *does* have retroactive effect, this Court's retroactivity decision will provide no relief in the circuit that originally reached the wrong conclusion. No prisoner in that circuit will be able to benefit from this Court's retroactivity ruling, because the one-year limitation period will already have run.

Finally, the minority's interpretation of paragraph 6(3) encourages federal prisoners to file potentially frivolous section 2255 motions every time this Court issues a decision, whether or not it states a new right or applies retroactively, for the sole purpose of protecting any possible right to relief they may have under it.

In sum, interpreting paragraph 6(3) to state that the limitation period begins to run when all three of its requirements have been satisfied accords with the plain language of the statute, as well as its placement and purpose in the statutory scheme enacted by the AEDPA. For Mr. Dodd, all three of paragraph 6(3)'s prerequisites were not satisfied until the Eleventh Circuit's decision in *Ross* concluded that *Richardson* initially recognized a new right that applied retroactively to collateral cases. Mr. Dodd's motion was timely, and this Court should reverse the decision of the court of appeals to the contrary.

ARGUMENT

I. PARAGRAPH 6(3) STATES THREE PREREQUISITES THAT MUST HAVE BEEN SATISFIED BEFORE ITS ONE-YEAR LIMITATION PERIOD BEGINS TO RUN.

No explicit time restriction applied to section 2255 motions before the enactment of the AEDPA. The pre-AEDPA version of section 2255 expressly gave prisoners the ability to file a motion "at any time," so long as they filed without prejudicial delay. *See* 28 U.S.C. § 2255 (1994); Rule 9(a), Rules Governing § 2255 Proceedings, 28 U.S.C. foll. § 2255; *Lonchar v. Thomas*, 517 U.S. 314 (1996).

Section 105 of the AEDPA, however, amended section 2255 to establish a "1-year period of limitation" for section 2255 motions. *See* AEDPA § 105, 110 Stat. 1220 (1996) The one-year period runs from the "latest of" four dates listed in paragraph 6 of section 2255. 28 U.S.C. § 2255. The first of these dates states the general rule that applies in the vast majority of cases. The general rule is that the one-year period begins to run from "the date on which the judgment of conviction becomes final." § 2255 para. 6(1).

The three other dates listed in paragraph 6 reflect Congress' decision to allow collateral litigation well after finality in certain exceptional circumstances. Each allows a motion to be filed more than a year after the date of finality by "reset[ting] the limitations period's beginning date, moving it from the time when the conviction became final to the later date on which the particular claim accrued." *Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000) (internal citation omitted). Thus, the removal of an unlawful governmental action that prevented the timely filing of a motion, § 2255 para. 6(2), or newly discovered facts, § 2255 para. 6(4), may reset the limitation period's beginning date.

The limitation clock may also be reset under the circumstances found in paragraph 6(3), the exception at issue here. Paragraph 6(3) provides that the one-year period begins to run on "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." § 2255 para. 6(3). This case turns on the meaning of these 34 words.

A. Paragraph 6(3) States Three Prerequisites All Phrased in the Past Tense.

When considering the meaning of a statute, this Court's "task is to construe what Congress has enacted." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). "The preeminent canon of statutory interpretation" requires this Court to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, ___, 124 S. Ct. 1587, 1593 (2004) (citing *Connecticut Nat. Bank v. Germaine*, 503 U.S. 249, 253-54 (1992)). So if Congress has enacted an unambiguous statute, then not only does this Court's "inquiry begin[] with the statutory text, [it] ends there as well." *Id.* This Court need not venture beyond the language of paragraph 6(3) of section 2255 to ascertain its meaning.

Paragraph 6(3) states that the limitation period begins to run on the date that the right asserted "was initially recognized" by this Court. § 2255 para. 6(3). But that is not all. Two more prerequisites follow. That is, in addition to "initially recogniz[ing]" the right, this Court must have "newly recognized" the right. *Id.* And a court, but not necessarily this Court,[2] must also have "made" the right "retroactively

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[2] The lower courts to consider the question have uniformly held that this Court need not make the retroactivity decision for purposes of paragraph 6(3); rather, any court may do so. *See* JA 23; *Lopez*, 248 F.3d at

applicable to cases on collateral review." *Id.* Thus, not any right will make the limitation period begin. Instead, the right must have been "initially recognized" by this Court, "ha[ve] been newly recognized" by this Court, "*and made* retroactively applicable to cases on collateral review." *See* § 2255 para. 6(3) (emphasis added).

Paragraph 6(3) not only states three prerequisites; it states these three prerequisites in the past tense. Under paragraph 6(3), the limitation period runs from the date on which the right asserted "*was* initially recognized," "*has been* newly recognized" and "*made* retroactively applicable." § 2255 para. 6(3) (emphasis added). "Congress' use of verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992). It must, therefore, be respected. Congress' use of the past tense to describe each of the three prerequisites in paragraph 6(3) mandates that all three prerequisites be satisfied *before* the one-year period starts.

Thus, paragraph 6(3) states three prerequisites in the past tense. By its plain language, it is not until a prisoner can show that all three of its prerequisites have been satisfied that the one-year period of limitation starts to run. This Court need look no further to interpret paragraph 6(3). *BedRoc Ltd.*, 541 U.S. at ___, 124 S. Ct. at 1593.

B. This Court's Precedents, Paragraph 6(3)'s Legislative History, and Other AEDPA Provisions Confirm the Conclusion that Paragraph 6(3) States Three Prerequisites in the Past Tense.

This Court's interpretation of another AEDPA provision analogous to paragraph 6(3), the legislative history of paragraph 6(3), and the text of other AEDPA provisions confirm that paragraph 6(3) states three prerequisites in the past tense.

432; *Ashley*, 266 F.3d at 673-74; *United States v. Swinton*, 333 F.3d 481, 487 (3d Cir.), *cert. denied*, 540 U.S. 977 (2003).

"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan*, 533 U.S. at 174). Federal courts have a "duty 'to give effect, if possible, to every clause and word of a statute.'" *Duncan*, 533 U.S. at 174 (quoting *United States v. Menasche,* 348 U.S. 528, 538-539 (1955)). This Court's interpretation of an AEDPA provision that is analogous to paragraph 6(3) confirms that by reading paragraph 6(3) to state three prerequisites in the past tense, this Court will "give effect to every clause and word" it states. *See Tyler v. Cain*, 533 U.S. 656 (2001) (interpreting 28 U.S.C. § 2244(b)(2)(A)).

Under 28 U.S.C. section 2244(b)(2), a federal court cannot consider a state prisoner's second or successive petition for habeas corpus relief unless that petition meets one of two exceptions. One of these two exceptions is found in section 2244(b)(2)(A).[3] Section 2244(b)(2)(A) requires, in pertinent part, that the petition contain a claim that relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

In *Tyler*, this Court read section 2244(b)(2)(A) as establishing "*three prerequisites* to obtaining relief in a second or

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[3] Section 2244(b)(2)(A) provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;
>
> * * *

28 U.S.C. § 2244(b)(2)(A).

successive petition: First, the rule on which the claim relies must be a 'new rule' of constitutional law; second, the rule must have been 'made retroactive to cases on collateral review by the Supreme Court'; and third, the claim must have been 'previously unavailable.'" *Tyler*, 533 U.S. at 662 (emphasis added). Mr. Tyler could not establish the second of these requirements—that the new rule on which he relied had been made retroactive by this Court. *Id.* at 664-666. As a result, this Court held that he had not satisfied the statutory prerequisites in section 2244(b)(2)(A) and could not file a second or successive petition. *Id.* at 667-668.

Tyler confirms the conclusion that paragraph 6(3) has three distinct prerequisites to the running of the limitation period: first, that the right asserted "was initially recognized" by this Court; second, that the right "has been newly recognized" by this Court; and third, that the right has been "made retroactively applicable to cases on collateral review." § 2255 para. 6(3). Thus, like the petitioner in *Tyler*, section 2255 movants relying on paragraph 6(3) to reset the limitation clock must show that all *three* of its prerequisites are satisfied.

Comparing paragraph 6(3)'s "made retroactively applicable" language to the nearly identical language in section 2244(b)(2)(A) also confirms that this Court must follow Congress' use of the past tense in paragraph 6(3). As discussed above, section 2244(b)(2)(A) allows the filing of a second or successive habeas corpus petition if it contains a claim that relies on "a new rule of constitutional law, *made retroactive* to cases on collateral review by the Supreme Court." § 2244(b)(2)(A) (emphasis added). When this Court considered the "made retroactive" requirement of section 2244(b)(2)(A) in *Tyler*, it determined that Congress' use of the past tense was critical. Although Mr. Tyler asked the Court to consider the retroactivity of the right at issue in the first instance, this Court declined to do so, concluding that the "made retroactive" requirement was satisfied only if Mr.

Tyler could "show[] that this Court *already had made*" the right at issue retroactive. *Tyler*, 533 U.S. at 667 (emphasis added). Because Mr. Tyler could not make that showing, his second habeas petition had to be dismissed.

This Court should similarly respect Congress' choice of verb tense in paragraph 6(3) by reading its words "made retroactively applicable" in exactly the same way as the "made retroactive" language considered in *Tyler*. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). The subtle distinction in language between paragraph 6(3) and section 2244(b)(2)(A) is one without a difference. *See Fischer v. United States*, 285 F.3d 596, 600 (7th Cir. 2002) (using language interchangeably); *Nichols v. United States*, 285 F.3d 445, 447 (6th Cir. 2002) (same). As a result, paragraph 6(3) does not reset the limitation clock unless a prisoner can show that a court "already had made" the right asserted retroactive to collateral cases. *See Tyler*, 533 U.S. at 668.

A proposed version of paragraph 6(3) provides an additional reason to respect Congress' use of the past tense in the present version. A predecessor proposal to the AEDPA, the Violent Crime Control and Law Enforcement Act of 1995, included an amendment to section 2255 that is structurally identical to the version ultimately enacted by the AEDPA. It created a limitation period for section 2255 motions that would have run from the latest of four dates, including "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Court and *is made* retroactively applicable." S.3, 104th Cong. § 508 (1995) (emphasis added).[4] Congress' decision to

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[4] Under S.3, the one-year limitation would have run from "the latest of—"

(1) the date on which the judgment of conviction becomes final;

change the phrase "*is made* retroactively applicable" to "made retroactively applicable" in the present paragraph 6(3) demonstrates its intent to use the past tense.

Additional evidence of Congress' intent can be found in 28 U.S.C. § 2264, another provision of the AEDPA. In pertinent part, 28 U.S.C. § 2264 provides that for certain capital habeas corpus proceedings,

> the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—
>
> * * *
>
> (2) the result of the Supreme Court's recognition of a new Federal right that *is made retroactively applicable*;

28 U.S.C. § 2264(a)(2) (enacted by AEDPA § 107(a), 110 Stat. 1223 (1996)) (emphasis added).

"It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Duncan*, 533 U.S. at 173 (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997), and *Russello v. United States*, 464 U.S. 16, 23 (1983)). A comparison of the text of paragraph 6(3) with that of section 2264(a)(2) "supplies strong evidence" that, had Congress intended the phrase "made retroactively applicable" to mean "*is* made retroactively applicable," Congress would have mentioned the word "is" expressly. *Id.* at 172. But Congress did not do so.

---

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by each governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Court and *is made* retroactively applicable;

(4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

S.3, 104th Cong. § 508 (1995) (emphasis added).

In sum, paragraph 6(3)'s plain language and legislative history, this Court's precedents, and other AEDPA provisions confirm that Congress intended that a prisoner relying upon paragraph 6(3) to reset the limitation clock must show that each of its three prerequisites has already been established.

C. The Minority View Eliminates Paragraph 6(3)'s Second Clause, And Changes Congress' Use of the Past Tense.

The minority view of paragraph 6(3), however, reads the statutory language differently. It interprets paragraph 6(3) to require the limitation period to run on "the date on which the right asserted was initially recognized by the Supreme Court . . . ." *See* JA 21; *Lopez*, 248 F.3d at 433; *Triestman*, 124 F.3d at 371 & n.13; *Nelson*, 184 F.3d at 954. This reading of paragraph 6(3) renders entirely unnecessary the second clause of the statute: "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." However, the duty of the federal courts "to 'give each word some operative effect' where possible, requires more in this context." *Duncan*, 533 U.S. at 175 (quoting *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 209 (1997)). It cannot be that Congress included these twenty words in the limitation provision applicable to section 2255 motions with the intent that they have no effect on the running of the limitation period.

Indeed, had this Court employed the minority's understanding of the rules of statutory construction in *Tyler*, the

result there would have been dramatically different. This Court would have concluded that the second and third clauses of section 2244(b)(2)(A) had no import and, accordingly, a petitioner could file a second or successive motion under section 2244(b)(2)(A) premised on a claim that relied only upon a "new rule of constitutional law," regardless of whether that rule was "made retroactive" or "previously unavailable." Of course, this Court said just the opposite.

The minority's interpretation of paragraph 6(3)'s start date not only renders superfluous the entire second clause of paragraph 6(3), but also changes Congress' choice of verb tense. *See, e.g, Lopez*, 248 F.3d at 430 (stating second and third requirements of paragraph 6(3) as "whether *Richardson creates* a 'newly recognized' right . . . that *is retroactive* on collateral review") (emphasis added); *Nelson*, 184 F.3d at 954 ("If the right *is* both newly recognized and *operates* retroactively . . . the statute of limitations for habeas corpus relief expires one year following the decision") (emphasis added). Indeed, the minority envisions a scenario in which a prisoner may file a section 2255 motion "as soon as" this Court announces the right upon which the motion is based "in the hope . . . that the district court *will find the right retroactively available* on collateral review." JA 27 (emphasis added). *See also* JA 25-26 (concluding paragraph 6(3) "provides a narrow exception which can be relied upon only when the new right recognized by the Supreme Court *can be retroactively applied* on collateral review"). This failure to respect Congress' use of the past tense cannot be reconciled with the language of the statute nor its legislative history.

Thus, the interpretation of paragraph 6(3) adopted by the minority of the circuits, and the court below, entirely rewrites the statutory language enacted by Congress. The minority has taken a 34-word provision that contains three prerequisites stated in the past tense, and turned it into a 14-word provision that contains but one requirement. This editing of

Congress' words cannot be reconciled with the language of the statute, its legislative history, or this Court's interpretation of the AEDPA.

II. INTERPRETING PARAGRAPH 6(3) TO RUN WHEN ITS THREE PREREQUISITES HAVE BEEN SATISFIED IS CONSISTENT WITH THE AEDPA'S PURPOSE AND THE STATUTORY SCHEME THE AEDPA CREATED.

In trying to ascertain the meaning of an Act of Congress it is important to "'consider not only the bare meaning' of the critical word[s] or phrase[s]" of the statute, "'but also its placement and purpose in the statutory scheme.'" *Holloway v. United States*, 526 U.S. 1, 6 (1999) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). Interpreting paragraph 6(3) to begin to run only when its three requirements have been satisfied is consistent with the AEDPA's purpose and statutory scheme. It allows prisoners the opportunity to obtain relief on claims premised on important new decisions of this Court that apply retroactively to collateral cases, including such claims raised in second or successive motions. It also discourages frivolous filings.

A. The AEDPA Gives Prisoners Whose Cases are Well Past Finality the Opportunity to Obtain Relief on Claims Premised on Important New Decisions of This Court That Apply Retroactively.

One clear purpose of the AEDPA is respect for the finality of criminal judgments. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000). Nonetheless, Congress enacted as part of the AEDPA a number of provisions that allow prisoners to obtain relief well past the date of finality. These provisions include the three circumstances stated in paragraph 6 of section 2255, which allow a prisoner to file a motion more than a year after the judgment of conviction has become final, *see* 28 U.S.C.

section 2255 paras. 6(2)-(4); and those allowing the filing of second or successive motions, *see* 28 U.S.C. section 2255 para. 8(1) & (2). Particularly pertinent here are the two instances where Congress extended the date of finality to allow federal prisoners the benefit of new decisions of this Court that have been held to apply retroactively to collateral cases. Paragraph 8(2) of section 2255 allows the filing of a second or successive motion premised on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255 para. 8(2). And, paragraph 6(3) resets the beginning of the one-year limitation period to the date on which "the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized and made retroactively applicable to cases on collateral review." § 2255 para. 6(3).

Is it not surprising that Congress would extend the date of finality for new rights that apply retroactively to collateral cases. These few such rights are important. They arise from decisions that interpret a criminal statute in a way that narrows the scope of the statute's application, *see Bousley*, 523 U.S. at 620-21, as well as those that place "a class of private conduct beyond the power of the State to proscribe" or prohibit "'a certain category of punishment for a class of defendants because of their status or offense.'" *Graham*, 506 U.S. at 477 (quoting *Saffle*, 494 U.S. at 494). Retroactive effect is also given to decisions that supply "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham*, 506 U.S. at 478 (quoting *Saffle*, 494 U.S. at 495). This Court must therefore consider Congress' decision to allow prisoners the opportunity to adjudicate the merits of these important rights in interpreting paragraph 6(3).

B. Reading Paragraph 6(3) as Beginning to Run When All Three of its Requirements Have Been Satisfied Allows a Realistic Possibility of Relief on a Second or Successive Motion That is Premised on a New Rule of Constitutional Law.

Congress' decision to allow the opportunity to adjudicate the merits of rights important enough to be held retroactively applicable also illuminates the interaction of paragraphs 6(3) and 8(2). Like initial motions, second or successive motions must be filed within the one-year limitation period enacted by the AEDPA. *See, e.g., In re Vial*, 115 F.3d 1192, 1197 & n.9 (4th Cir. 1997); *Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997); *Liriano v. United States*, 95 F.3d 119, 123 (2d Cir. 1996). Therefore, this Court's interpretation of paragraph 6(3) should honor Congress' decision in paragraph 8(2) to allow an opportunity for relief on a second or successive motion that asserts a new rule of constitutional law.

Paragraph 8(2) precludes the filing of a second or successive motion premised on a new rule of constitutional law unless "*this Court*," rather than a lower court, "*already had made*" that new rule retroactively applicable to collateral cases. *Tyler*, 533 U.S. at 667-668 (emphasis added) (discussing identical language in § 2244(b)(2)(A)). For this reason, this Court cannot make the retroactivity ruling required under paragraph 8(2) in a case involving a second or successive motion. *Id.* at 667-68. The only way in which this Court can make a new rule of constitutional law retroactive—thereby allowing the filing of a second or successive motion under paragraph 8(2)—is in a case where a prisoner's filing of an initial section 2255 motion ultimately results in this Court adjudicating the retroactivity issue. Thus, when this Court issues a decision involving a rule of constitutional law, Congress intended the lower courts to determine first—through an initial section 2255 motion—whether that decision is a new rule that applies retroactively.

If the one-year limitation period begins to run under paragraph 6(3) with this Court's initial decision, as the minority of circuits believe, the lower courts would have to resolve these complicated questions quickly enough to allow a case in the proper posture to reach this Court within a year of the initial decision. That is, within one year, the district court and court of appeals would have to adjudicate the retroactive application of this Court's initial decision, and this Court would have to grant *certiorari* and hold that the right applies retroactively. That would be the very rare case. *See Duncan*, 533 U.S. at 186 (Breyer, J., dissenting) (noting that nearly half of all prisoner petitions remain pending in the district court for six months or longer and 10% remain pending more than two years). More realistically, the limitation period will have run long before a case ever gets to this Court. And, although this Court eventually might hold the rule retroactive so that paragraph 8(2) would allow the filing of a second or successive motion, no prisoner could ever obtain relief in a successor posture because the statute of limitations in paragraph 6(3) would already have expired.

The minority's interpretation of paragraph 6(3) would, therefore, render paragraph 8(2) irrelevant. *See Tyler*, 533 U.S. at 677 (Breyer, J., dissenting) (noting that opportunity for relief in second or successive motion "will remain open only if the relevant statute of limitations is interpreted to permit its 1-year filing period to run from the time that this Court has 'made' a new rule retroactive, not from the time it initially recognized that new right"). There is no reason to believe that Congress would have gone to the trouble of enacting paragraph 8(2) if it understood that the operation of paragraph 6(3) would, for all practical purposes, make it impossible for a federal prisoner to file a second or successive motion premised on a new rule of constitutional law.

In contrast, starting the limitation period from the date on which all three prerequisites in paragraph 6(3) are met allows

for the possibility of second or successive motions premised on a new rule of constitutional law made retroactive by this Court. It allows the question of whether the rule at issue has been "initially recognized," "newly recognized" and "made retroactively applicable" to percolate in the lower courts before reaching this Court. Allowing this percolation would help clarify the retroactivity issue and better define the scope of the right announced in this Court's initial decision.

Moreover, under this reading of paragraph 6(3), the limitation period would not begin to run until a court of appeals[5] held the right at issue was both "new "and "retroactively applicable," and the one-year period would begin running only in that circuit. If the right at issue were one of constitutional law, such that a retroactivity ruling by this Court would trigger the ability to file a second or successive motion, this Court would presumably weigh that factor in determining whether to review the court of appeals' decision on certiorari. But certainly, this Court could review a retroactivity ruling by a court of appeals quickly enough to allow time for prisoners to file a second or successive motion premised on the retroactivity decision. *See, e.g., Schriro v. Summerlin*, ___ U.S.___, 124 S. Ct. 2519 (2004) (resolving question of whether *Ring v. Arizona*, 536 U.S. 584 (2002), applies retroactively to collateral cases nine months after ruling by court of appeals in *Summerlin v. Stewart*, 341 F.3d 1082 (2003) (*en banc*)). Thus, interpreting paragraph 6(3) to require a prisoner to show that all three of its prerequisites have been satisfied before the one-year period begins to run allows a realistic possibility of second or successive motions premised on a new rule of constitutional law. In contrast, the minority's interpretation offers no such possibility at all, and

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[5] The one-year period would not begin to run until the court of appeals made the retroactivity decision, because a district court decision does not bind the district court that issued it, much less other district courts. Only a decision of the court of appeals would do so.

therefore cannot be reconciled with Congress' enactment of paragraph 8(2).

C. Interpreting Paragraph 6(3) to Run When All Three of its Prerequisites Have Been Established Prevents the Unfairness that Results When The Right to Relief Depends Upon Where the Motion Happens to be Filed.

Paragraph 6(3) will most frequently come into play in the situation where a right is "initially recognized" in one case, and then recognized as a "new" right and "made retroactively applicable" in a later decision or decisions.[6] An example of this scenario is found in this Court's decisions in *Bailey* and *Bousley*. In *Bailey*, this Court defined the elements of an offense under 18 U.S.C. § 924(c)(1). *See Bailey*, 516 U.S. at 506. Three years later this Court held *Bailey* applied retroactively to collateral cases. *Bousley*, 523 U.S. at 620-21.

Concluding that paragraph 6(3)'s limitation period does not begin to run until all three of its requirements have been

[6] The reverse is also possible: a right may be determined to be new and made retroactively applicable before the substantive right is initially recognized. This situation arises because this Court in *Teague v. Lane*, 489 U.S. 288 (1989), opined that the question of whether a new rule applies retroactively to collateral cases must be addressed as a "threshold" matter *before* a court may consider the merits of the underlying substantive claim. 489 U.S. at 300-01. An example of this scenario is found in this Court's decisions in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Penry*, this Court determined that were it to hold that the Eighth Amendment prohibits the execution of mentally retarded persons, it would be announcing a "new" rule that applied retroactively to collateral cases, but concluded the Eighth Amendment erected no such bar and denied relief. *Id.* at 329, 340. It was not until thirteen years later that the Court reversed its substantive ruling and declared that the Eighth Amendment barred the execution of the mentally retarded. *Atkins*, 536 U.S. at 321. Of course, this Court could also initially recognize a new right and make it retroactively applicable all in a single decision.

satisfied provides for the possibility that the lower courts may make an incorrect retroactivity determination. Under this reading of the statute, if this Court initially recognizes a right in Case A, the fact that a court of appeals may incorrectly rule that Case A does not apply retroactively to collateral cases will not affect the ability of prisoners to file timely motions under paragraph 6(3)—and the opportunity to obtain section 2255 relief—if the right is later found to do so. Because the running of the limitation period is linked to all three prerequisites in the statute, in those circuits that hold that Case A does not apply retroactively, the one-year filing period would not begin to run under paragraph 6(3) unless and until this Court ultimately decides in Case B that Case A applies retroactively. Although the fact that a court of appeals made an incorrect retroactivity determination may delay the ability to obtain relief under Case A, it does not preclude all possibility of relief.

The minority view of paragraph 6(3), however, enshrines a retroactivity decision by a court of appeals even though this Court later deems that decision to be incorrect. Under the minority view, prisoners seeking the benefit of the decision in Case A must file their motions within a year of that decision or lose all opportunity for relief. For those motions that are filed within a year of Case A, the lower courts will have to consider whether they can grant relief. Wrapped up in that merits determination is the issue of whether Case A states a new rule that applies retroactively to collateral cases. If a court of appeals eventually determines that the right established in Case A does not apply retroactively, and this Court, for whatever reason, denies certiorari, the court of appeals' denial of relief on the merits would become final. The district courts in that circuit would rely on the appellate court's decision to summarily deny motions raising claims under Case A, thereby quickly disposing of the majority of them.

But suppose not long thereafter, this Court grants certiorari in Case B to determine whether Case A applies retroactively to collateral cases, and concludes that it does. In those circuits where the court of appeals has already made an incorrect retroactivity determination, Case B offers no relief. More than one year will surely have run from the decision in Case A, and this Court's decision in Case B will not have triggered a new limitation period. Accordingly, no motion filed after Case B would be timely. In the end, prisoners in those circuits that reached the correct retroactivity decision would have the ability to obtain relief based on the right announced in Case A, whereas prisoners in those circuits who reached the wrong retroactivity decision would not. In other words, in some circuits this Court's decision in case B would not be the supreme law of the land. This cannot be the result Congress intended in enacting paragraph 6(3).

D. Requiring the One-Year Period to Run from the Date On Which All Three Requirements in Paragraph 6(3) Are Satisfied Discourages the Filing of Frivolous Motions.

Finally, requiring the one-year period of limitation to run from the date all three requirements in paragraph 6(3) are satisfied comports with the purpose of the AEDPA to curb frivolous applications for collateral relief. *See, e.g., Martin v. Bissonette*, 118 F.3d 871, 874 (1st Cir. 1997). It allows federal prisoners the opportunity to make an informed decision about whether to file a section 2255 motion premised upon a recent ruling by this Court, because once all three requirements are established, it will be clear that ruling provides a possibility of relief. In this way, prisoners may wait until it is possible to evaluate the likelihood of a motion's success on the merits, without the concern that by doing so, they risk all opportunity for relief because the statute of limitations may have run.

In sharp contrast, reading paragraph 6(3) to begin to run "on the date on which the right asserted was initially recognized" by this Court encourages federal prisoners to file potentially frivolous section 2255 motions every time this Court issues a decision, whether or not that decision involves a "newly recognized right," and even though that right may never be applied retroactively and, therefore, may never offer the opportunity for relief. For example, this Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), has been described as potentially affecting thousands of federal prisoners. *Id.* at 2549 & n.2 (O'Connor, J., dissenting). This Court's recent decision in *United States v. Booker*, ___ U.S. ___, 2005 WL 50108 (U.S. Jan. 12, 2005), raises similar concerns. If the one-year limitation period begins to run on the date this Court decided *Blakely* and *Booker*, large numbers of federal prisoners will feel compelled to file section 2255 motions within a year of those decisions rather than risk losing the opportunity to obtain any relief they may provide. And these prisoners will feel compelled to file even though it is not clear whether either *Blakely* or *Booker* involve a "newly recognized right," or whether either of these decisions will ever be made retroactively applicable to cases on collateral review.

E. Paragraph 6(3)'s Placement and Purpose in the AEDPA Compel the Conclusion that All Three of Its Prerequisites Must be Satisfied Before the Limitation Period Begins to Run.

Interpreting paragraph 6(3) as beginning to run when its three prerequisites have been satisfied is consistent with the AEDPA's purpose and the statutory scheme the AEDPA enacted. This interpretation advances Congress' intent to give federal prisoners the ability to obtain section 2255 relief on a claim premised on a new decision of this Court that has been held to apply retroactively to collateral cases, even if the claim arose years after finality. It allows for the possibility of

second or successive motions premised on a new rule of constitutional law under paragraph 8(2) of section 2255, and ensures that the opportunity to obtain relief based on a new right held retroactive is not dependent on the jurisdiction in which the motion is filed. This interpretation also discourages the filing of frivolous motions.

In contrast, the minority view vitiates Congress' intent to provide an avenue for federal prisoners to adjudicate those few important rights that apply retroactively to collateral cases, and encourages the filing of frivolous motions. It fails to accord with paragraph 6(3)'s placement and purpose in the AEDPA, and this Court should reject it.

III. MR. DODD'S MOTION WAS TIMELY FILED.

Interpreting paragraph 6(3) to state that the limitation period begins to run when all three of its requirements have been satisfied accords with the plain language of the statute, as well as its placement and purpose in the statutory scheme enacted by the AEDPA. For Mr. Dodd, all three of paragraph 6(3)'s prerequisites were not satisfied until the Eleventh Circuit's decision in *Ross* concluded that *Richardson* initially recognized a new right that applied retroactively to collateral cases. Mr. Dodd's motion was timely, and this Court should reverse the decision of the court of appeals to the contrary.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court of appeals.

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(3)

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No. 04-5286

In the Supreme Court of the United States

MICHAEL DONALD DODD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the one-year limitations period in 28 U.S.C. 2255 para. 6(3) begins to run on the date on which the right asserted is initially recognized by this Court or whether, instead, the limitations period begins to run on the date on which this Court or another court first holds that the relevant right applies retroactively to cases on collateral review.

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In the Supreme Court of the United States

No. 04-5286

MICHAEL DONALD DODD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 16-33) is reported at 365 F.3d 1273. The district court's order of dismissal (J.A. 15) is unreported, as is the report and recommendation of the magistrate judge (J.A. 11-14) on which the district court relied.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2004. The petition for a writ of certiorari was filed on July 14, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Section 2255 of Title 28 of the United States Code are set forth in an appendix to this brief.

STATEMENT

Petitioner was indicted on June 25, 1993, in the United States District Court for the Southern District of Florida, for knowingly and intentionally engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 841 and 846 (Count 1); conspiring to possess with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) (Count 2); conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 3); and sixteen counts of using and possessing a passport obtained by false statement, in violation of 18 U.S.C. 1546(a) (Counts 4-19). After trial by jury, petitioner was found guilty on all counts except Count 3. Petitioner was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed the conviction on May 7, 1997. See *United States* v. *Dodd*, 111 F.3d 867 (11th Cir.) (per curiam); J.A. 17.

On April 4, 2001, petitioner filed a motion under 28 U.S.C. 2255, seeking to set aside his CCE conviction based on *Richardson* v. *United States*, 526 U.S. 813 (1999), which this Court decided on June 1, 1999. J.A. 18. The district court dismissed the motion as time-barred, J.A. 15, and the court of appeals affirmed the dismissal, holding that petitioner's one year to file a motion under Section 2255 para. 6(3) began to run on the date *Richardson* was decided and had elapsed before the instant motion was filed. J.A. 33.

1. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, no statute of limitations governed motions for collateral relief under 28 U.S.C. 2255. Under the pre-AEDPA law, a federal prisoner could file such a motion "at any time," 28 U.S.C. 2255 para. 2 (1994), and the government was entitled to have

the motion dismissed as untimely only if it was "prejudiced in its ability to respond to the motion by delay in its filing," Rule 9(a) of the Rules Governing § 2255 Proceedings (28 U.S.C. at 490). As a result, a prisoner could wait an indefinite period after his conviction before seeking collateral relief.

To "curb the lengthy delays in filing" that "often occur in federal habeas corpus litigation," H.R. Rep. No. 23, 104th Cong., 1st Sess. 9 (1995), Congress added a statute of limitations when it enacted the AEDPA. Section 105 of AEDPA, 110 Stat. 1220, which is codified in paragraph 6 of 28 U.S.C. 2255, establishes a "1-year period of limitation" for motions brought under Section 2255. The period runs from "the latest" of a number of events, which are set forth in subparagraphs (1) through (4) of paragraph 6.

The general rule, found in subparagraph (1), and interpreted by this Court in *Clay* v. *United States*, 537 U.S. 522 (2003), is that the triggering date is "the date on which the judgment of conviction becomes final." Three exceptions to that rule permit the one-year limitation period to begin later. Under subparagraph (2), the one-year period begins to run on "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action." Under subparagraph (4), the provision at issue in *Johnson* v. *United States*, cert. granted, No. 03-9685 (Sept. 28, 2004), the one-year period begins to run on "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." This case involves subparagraph (3), under which the one-year period begins to run on "the date on which the right asserted was

initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

2. a. Petitioner was a leader of a large Jamaican drug distribution network in New York City called the "Spangler Posse." Gov't C.A. Br. 4.[1] In September 1988, Audley Antonio and Ainsley Brown were arrested in Mississippi transporting more than $500,000 in U.S. currency hidden in their vehicles. The cash was being delivered to Manley Cargill in Florida, who was a source of cocaine for the Spangler Posse. *Id.* at 3-4. At trial, the government called five witnesses who were actively involved in the Spangler Posse in the 1970s and 1980s. Their testimony demonstrated that the Posse purchased cocaine and marijuana in Florida and other places and sold the drugs in Manhattan at least until the late 1980s, and that petitioner was one of the organization's leaders. *Id.* at 5-16.

b. After a jury found him guilty of numerous drug violations, including engaging in a CCE, petitioner appealed his conviction, challenging certain statements made by the prosecutor and by a government witness and arguing that he should have received an adjustment at sentencing for acceptance of responsibility. The court of appeals affirmed the conviction and sentence on May 7, 1997. See *United States* v. *Dodd*, 111 F.3d 867 (11th Cir.) (per curiam). Petitioner did not file a petition for a writ of certiorari, and his conviction therefore became final on August 6, 1997, when the time for filing such a petition expired. J.A. 18.

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[1] "Gov't C.A. Br." refers to the government's brief in the initial appeal of petitioner's conviction, in *United States* v. *Dodd*, No. 95-4978.

3. On June 1, 1999, this Court decided *Richardson* v. *United States*, 526 U.S. 813, which held that, to find a defendant guilty on a CCE count, a jury must agree unanimously on the constituent drug violations that make up the continuous series of violations.

4. On April 4, 2001, more than three years after his conviction became final and nearly two years after this Court's decision in *Richardson*, petitioner filed a motion under Section 2255, arguing that his Sixth Amendment and due process rights were violated because the jury in his underlying criminal case was not instructed that the CCE charge required that it unanimously agree on the constituent drug violations that formed the series. The government argued that petitioner's claim was time-barred, because it was filed beyond the one-year limitations period set forth in 28 U.S.C. 2255 para. 6.

Petitioner responded that the motion was timely because it was filed within a year of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and also noted that the motion was based in part on *Richardson*. J.A. 12-13. In addition, he argued that the limitations period should be equitably tolled because he had been transferred to another facility during that time period. J.A. 13.

The district court, adopting the reasoning of the magistrate judge's report and recommendation, rejected those arguments. The court concluded, first, that the Eleventh Circuit had held, in *McCoy* v. *United States*, 266 F.3d 1245, 1259 (2001), cert. denied, 536 U.S. 906 (2002), that *Apprendi* does not apply retroactively to cases on collateral review; second, that *Richardson* had been decided more than one year before petitioner filed his Section 2255 motion, and the motion was therefore outside the limitations period; and third, that

petitioner had not demonstrated the extraordinary circumstances that would justify equitable tolling. J.A. 13. The court dismissed the motion as time-barred. J.A. 15.

5. The court of appeals affirmed the dismissal. J.A. 33.

On appeal, petitioner contended, *inter alia*, that the one-year limitations period defined in 28 U.S.C. 2255 para. 6(3) did not begin to run until April 19, 2002, the date on which the court of appeals decided *Ross* v. *United States*, 289 F.3d 677 (11th Cir.), cert. denied, 537 U.S. 1113 (2003), which held that the rule announced in *Richardson* applied retroactively to cases on collateral review. J.A. 19. The government disagreed, arguing that the limitation period began to run on the date this Court decided *Richardson*. The court of appeals, while acknowledging a circuit split on the question,[2] agreed with the government's position. J.A. 20-21.

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[2] Compare *United States* v. *Lopez*, 248 F.3d 427, 432-433 (5th Cir.), cert. denied, 534 U.S. 898 (2001) (period runs from date of Supreme Court decision initially recognizing the right asserted); *Nelson* v. *United States*, 184 F.3d 953, 954-955 (8th Cir.) (same), cert. denied, 528 U.S. 1029 (1999); *Triestman* v. *United States*, 124 F.3d 361, 371 n.13 (2d Cir. 1997) (same); with *Pryor* v. *United States*, 278 F.3d 612, 616 (6th Cir. 2002) (limitations period does not begin to run until the right has been held retroactive to cases on collateral review); *Ashley* v. *United States*, 266 F.3d 671, 672 (7th Cir. 2001) (same); *United States* v. *Valdez*, 195 F.3d 544, 547-548 (9th Cir. 1999) (same); *United States* v. *Lloyd*, 188 F.3d 184, 188 (3d Cir. 1999) (same); *In re Vial*, 115 F.3d 1192, 1197 n.9 (4th Cir. 1997) (same).

Two other circuits have noted the conflict, but have not taken a position on the correct understanding of Section 2255 para. 6(3). See *Sepulveda* v. *United States*, 330 F.3d 55, 64 n.5 (1st Cir. 2003); *Haugh* v. *Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000).

As a preliminary matter, the court of appeals noted that it had already held that *Richardson* established a newly created right within the meaning of paragraph 6(3) and that the right is retroactively available on collateral review. J.A. 22-23 (citing *Ross*, *supra*). The court also noted that "[n]either party contends that [paragraph 6(3)] requires that the retroactivity decision be made by the Supreme Court; rather, any court may do so." J.A. 23.

Turning to the question of when the limitations period begins to run, the court noted that "the statute provides that the limitations period begins to run on the date on which the right asserted was *initially* recognized by the Supreme Court." J.A. 25. The court of appeals then addressed "the purpose of the qualifying clause that follows: 'if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.'" J.A. 25 (quoting 28 U.S.C. 2255 para. 6(3)). The court found that the clause "simply reiterat[es] the obvious:" that paragraph 6(3) "provides a narrow exception which can be relied upon only when the new right recognized by the Supreme Court can be retroactively applied on collateral review." J.A. 25-26. Thus, the court found, the second clause in Section 2255 para. 6(3) "qualifies the right asserted—not the time limit." J.A. 26. The court of appeals concluded:

> if Congress intended the limitations period to begin running when a right was made retroactive, it could easily have said the limitation period shall run from the date on which a right newly recognized by the Supreme Court has been made retroactively applicable on collateral review. Instead, Congress has written that "[t]he limitation period shall run from . . . the date on which the right asserted was

> *initially* recognized by the Supreme Court. . . ." 28 U.S.C. § 2255(3) (emphasis added). There is no reason to believe that Congress intended this unequivocal phrase to mean anything other than what it says.

J.A. 26.

SUMMARY OF ARGUMENT

A Section 2255 motion is timely under 28 U.S.C. 2255 para. 6(3) if it is filed within one year after "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." The plain text of that provision unambiguously sets one and only one date from which the one year period runs—"the date on which the right asserted was initially recognized by the Supreme Court." Accordingly, regardless of any other requirements of paragraph 6(3), a Section 2255 motion that is filed more than one year after that date is not timely under that provision. Petitioner's Section 2255 motion asserted a right based on *Richardson*, *supra*, which was decided on June 1, 1999. Because the motion was filed on April 4, 2001, far more than one year after *Richardson* was decided, petitioner's motion is not timely under paragraph 6(3).

The "if" clause in paragraph 6(3) sets a condition on the use of the date specified; it does not identify (or even refer in any way to) any other or later date by which a timely Section 2255 motion can be filed. In particular, the "if" clause states that a right must have been newly recognized by this Court and made retroactive. To the extent the conditions specified in the "if" clause are not satisfied, the statute of limitations in paragraph 6(3) is inapplicable, and the case is governed

by the general one-year-from-final-judgement rule laid out in paragraph 6(1). The language in the "if" clause does not identify the date on which the newly recognized right is made retroactive as the triggering date that commences the running of the one-year limitations period.

There are two interpretive issues that arise in construing the "if" clause: whether the retroactivity holding may be made by any court with jurisdiction over the Section 2255 motion or only this Court, and whether the retroactivity holding must be made before the Section 2255 motion is filed. The resolution of those issues, however, bears only on whether the conditions expressed in the "if" clause are satisfied. If those conditions are satisfied, a Section 2255 motion may be filed up to one year from the initial recognition of the right by this Court. Resolution of those interpretive issues, however, could not alter the date from which the one-year period is measured (the date of initial recognition by this Court), and it could not render timely petitioner's Section 2255 motion, which was filed more than one year after the *Richardson* right was initially recognized.

It is true that allowing Section 2255 motions for only one year from the date this Court initially recognizes a new right will likely limit the ability of prisoners to file timely second or successive Section 2255 motions. This Court rarely will hold a new rule retroactive within a year of initially recognizing it, and such a retroactivity decision by this Court was held in *Tyler* v. *Cain*, 533 U.S. 656 (2001), to be a prerequisite under Section 2255 para. 8(2) for a prisoner to file a second or successive petition based on the new rule. Nonetheless, the fact that second or successive petitions will often be untimely does not provide a basis for disregarding the

plain terms of paragraph 6(3). This Court has often recognized that "[f]inality is essential to both the retributive and the deterrent functions of criminal law." *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998). It is for Congress to draw the balance between the need for a final end to litigation and the goals served by collateral review. Congress has done so in paragraph 6(3). If the balance results in restricting second or successive Section 2255 motions, where the costs to finality are particularly high, that is the result of Congress's design. It does not provide a basis for courts to rewrite the plain language of paragraph 6(3), as petitioner's theory would require, to make more second and successive motions timely.

The one-year limitations period in paragraph 6(3) is based on policies of repose and elimination of stale claims, which are of exceptional importance on collateral review of criminal convictions. The judgment Congress made in paragraph 6(3) is to permit Section 2255 motions based on a new rule recognized by this Court to be filed, but to mitigate the resulting costs by requiring such motions to be filed within a reasonable, one-year period after the right is recognized. Petitioner's rule, which would permit Section 2255 filings many years after a new rule is initially recognized, is inconsistent with Congress's judgment in paragraph 6(3) about how to draw the proper balance. It should be rejected.

ARGUMENT

THE LIMITATIONS PERIOD IN 28 U.S.C. 2255 PARA. 6(3) BEGINS TO RUN FROM THE DATE THIS COURT INITIALLY RECOGNIZES THE RIGHT ASSERTED, NOT FROM THE DATE IT HAS BEEN HELD TO BE RETROACTIVELY APPLICABLE TO CASES ON COLLATERAL REVIEW

A. The Text Of Section 2255 Para. 6(3) Unambiguously Begins The One-Year Period From The Date This Court Initially Recognizes The Right Asserted

Paragraph 6 of Section 2255 provides that "[a] 1-year period of limitation shall apply to a motion under [Section 2255]," and that "limitation period shall run from the latest of" four dates. The generally applicable date available to all Section 2255 applicants is set forth in paragraph 6(1)—one year from "the date on which the judgment of conviction becomes final." See *Clay* v. *United States*, 537 U.S. 522, 524 (2003). This case concerns the limitation period in paragraph 6(3), which may permit a later filing than would be permitted under the general rule set forth in paragraph 6(1).[3]

The text of paragraph 6(3) unambiguously identifies one and only one date from which its one-year period runs: "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. 2255 para. 6(3). Petitioner's Section 2255 motion asserted a right based on *Richardson*. This

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[3] A virtually identical limitations period applies to habeas petitions by state prisoners under 28 U.S.C. 2244(d). This Court's resolution of the question presented in this case is therefore likely to govern that provision as well.

Court decided *Richardson* on June 1, 1999. That is the one and only "date on which the right asserted [by petitioner] was initially recognized by the Supreme Court." If paragraph 6(3), as opposed to the general rule of paragraph 6(1), is applicable to petitioner's Section 2255 motion at all, therefore, its limitation period terminated on June 1, 2000. Petitioner filed his Section 2255 motion on April 4, 2001, almost two years after *Richardson* was decided. Accordingly, his motion was not timely.

The unambiguous language of paragraph 6(4)'s main clause resolves this case. As petitioner agrees (Br. 14 "[t]he preeminent canon of statutory interpretation requires [the court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd., LLC* v. *United States*, 124 S. Ct. 1587, 1593 (2004) (quoting *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992)). Although paragraph 6(3) contains a second clause, it imposes a condition on the applicability of paragraph 6(3) and does not set any date other than "the date on which the right asserted [by petitioner] was initially recognized by the Supreme Court" as the date from which the one-year limitations period runs. Indeed, no other part of paragraph 6(3) even refers to any other date. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). Accordingly, a prisoner like petitioner asserting a *Richardson* claim may rely on paragraph 6(3) to establish that his Section 2255 motion is timely only if he filed it within a year after June 1, 1999.

B. The "If" Clause In Paragraph 6(3) Does Not Support Running The Time Period From Any Date Other Than The Date This Court Initially Recognized The Right Asserted

Paragraph 6(3) does contain a dependent clause beginning with the word "if"—"if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." An "if" clause states a condition.[4] Accordingly, the "if" clause in paragraph 6(3) states a condition on an applicant's use of the date in that paragraph to render a petition timely. If the "newly recognized and made retroactive" condition is satisfied, then a Section 2255 applicant may make use of the "initially recognized" date of paragraph 6(1) and must rely on another provision to establish the timeliness of the Section 2555 motion. If the "newly recognized and made retroactively applicable" condition is not satisfied, the applicant may not make use of the "newly recognized" date of paragraph 6(3) and must rely on another provision to establish the timeliness of his motion. Although the "if" clause thus does establish a condition, it does not alter "the date on which the right asserted was initially recognized" by this Court.

1. Petitioner argues (Br. 19) that, if paragraph 6(3) is read to run the limitations period from "the date on which the right asserted was initially recognized by the

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[4] The pertinent definitions of "if" in *Webster's Third New International Dictionary* (1993) are "in the event that: in case," "supposing," "so long as : on condition that." *Id.* at 1124. Although a few other definitions are given as well (*e.g.*, "allowing, conceding, or granting that," "whether," "even though"), none of them is applicable here, and none of them in any event would support petitioner's argument. See also *Webster's Second New International Dictionary* 1238 (1953) ("If implies a condition.").

Supreme Court," it would "render[] entirely unnecessary" the "if" clause of the statute, in violation of the Court's "reluctance to treat statutory terms as surplusage." *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698 (1995). That criticism is not well taken. While the "if" clause cannot textually be read to change the "initially recognized" date as the date from which the one-year limitations period under paragraph 6(3) runs, it does, by stating a condition on the use of that "initially recognized" date, serve the distinct function of identifying the cases in which paragraph 6(3) is applicable. That is, the "if" clause makes clear that paragraph 6(3) applies to those cases in which the right "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." If the right is not a new right that is retroactively applicable, then the "initially recognized" date is of no significance.

In that respect, the "if" clause in paragraph 6(3) is parallel to the "if" clause in paragraph 6(2), which provides that the one-year period shall run from

> the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action.

In that provision, the "if" clause similarly states a condition applicable to the use of the identified date to establish the timeliness of an application. If the applicant was *not* "prevented from making [the] motion by * * * governmental action," then the applicant may not make use of "the date on which the impediment to * * * is removed" to establish the timeliness of the application.

A court may well have implied the paragraph 6(2) condition, like the paragraph 6(3) condition, from the balance of the statutory text. Even without the "if" clause, a court could well have interpreted the date in paragraph 6(2) to be available only if an applicant had been prevented by governmental action from filing his motion. Similarly, a court would likely have interpreted the date identified in the first clause of paragraph 6(3) to be available only if the right asserted in the Section 2255 motion is retroactively applicable to cases on collateral review. Nonetheless, the "if" clause in both provisions does serve the genuine function of explicitly identifying the cases in which the identified date is available to establish the timeliness of a Section 2255 motion. Moreover, those clauses reinforce the overall structure of paragraph 6, which sets forth a general rule in paragraph 6(1) subject to potentially more generous periods that are more narrowly circumscribed.

2. In any event, although the canon that a court must "give effect, if possible, to every clause and word of a statute," *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955)), is an important guide to statutory construction, the qualification "if possible" must be kept in mind. For example, even petitioner's proposal that the time for filing a Section 2255 motion runs for one year from the date that a new right has been made retroactive gives no independent force to the phrase "has been newly recognized by the Supreme Court" in the "if" clause of paragraph 6(3); to all appearances, that phrase ("newly recognized by the Supreme Court") essentially just repeats the preceding phrase ("initially recognized by the Supreme Court"). Statutes occasionally contain such surplusage. As the Court has recently explained, "[s]urplusage does not always produce ambi-

guity and [the Court's] preference for avoiding surplusage constructions is not absolute." *Lamie*, 540 U.S. at 536. If the only way to give meaning to such surplusage would be to contradict the plain meaning of the language Congress used in the balance of the statute, the correct course is to "prefer the plain meaning." *Ibid.*; see *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001). The plain meaning of paragraph 6(3) provides only one possible date from which the one-year limitations period runs—"the date on which the right asserted was initially recognized by the Supreme Court."

C. Although Interpretive Issues Do Arise In Construing The "If" Clause Of Paragraph 6(3), Resolution Of Those Issues Could Not Affect The Date From Which The One-Year Limitations Period Runs

Paragraph 6(3) is unambiguous with respect to the issues necessary to the disposition of this case—the date from which the limitations period runs and the one-year duration of that period. The "if" clause of paragraph 6(3), however, does raise some interpretive questions in its "made retroactively applicable" provision—in particular, the identity of the court that has to make the retroactivity ruling and whether the retroactivity ruling has to be made before the Section 2255 motion is filed. The resolution of those issues, however, could have no effect on the outcome of this case, because resolving them could, at most, render paragraph 6(3) wholly inapplicable to petitioner's Section 2255 motion. No resolution of the interpretive questions in the "if" clause could extend the date from which the limitations period runs (the date *Richardson* was decided) or provide for a longer period than the one-year period prescribed by Congress.

1. *What court may decide that the right is retroactive?*

It could be argued that, because paragraph 6(3) otherwise expressly requires that this Court "initially recognize[]" and this Court "newly recognize[]" the right asserted in the Section 2255 motion, paragraph 6(3) should be read to have implicitly required this Court to make the right retroactive as well. Under that reading, a Section 2255 motion could rely on the limitations period in paragraph 6(3) only on the basis of a ruling by this Court that the right asserted in the motion is retroactive; a ruling by some other court would be insufficient. In a footnote in its brief in *Tyler* v. *Cain*, 533 U.S. 656 (2001), the United States suggested (see 00-5961 U.S. Amicus Br. at 16 n.7) that construction of the virtually identical limitations provision applicable to state habeas petitions, 28 U.S.C. 2244(d)(1)(C).

No court, however, has adopted that view. See J.A. 23 (citing cases). The "made retroactively applicable" clause of paragraph 6(3) differs from the "initially recognized" and "newly recognized" clauses, in that the latter two clauses expressly refer to this Court ("initially recognized *by the Supreme Court*," "newly recognized *by the Supreme Court*"), while the "made retroactively applicable" clause does not. In addition, the "made retroactively applicable" clause differs from other, related provisions in which Congress expressly tied a legal consequence to a decision by this Court. See 28 U.S.C. 2244(b)(2)(A) ("made retroactive to cases on collateral review *by the Supreme Court*") (emphasis added); see also 28 U.S.C. 2255 para. 8(2) (same). The "disparate inclusion or exclusion" of the express reference to this Court, *Duncan*, 533 U.S. at 173 (quoting *Bates* v. *United States*, 522 U.S. 23, 30 (1997)), suggests

that, in all of those provisions, Congress referred to this Court expressly when it intended to refer only to rulings of this Court. Because the "made retroactively applicable" clause does not refer expressly to this Court, it may be inferred that Congress intended that any court with jurisdiction, not merely this Court, could make the right retroactively applicable for purposes of paragraph 6(3).[5] See *Ashley* v. *United States*, 266 F.3d 671, 674 (7th Cir. 2001). After *Tyler*, the United States adopted that view, with which the court of appeals (see J.A. 23) and petitioner (Br. 13) agree. See, *e.g.*, *Wiegand* v. *United States*, 380 F.3d 890, 892 (6th Cir. 2004); *United States* v. *Swinton*, 333 F.3d 481, 487 (3d Cir.), cert. denied, 540 U.S. 977 (2003).[6]

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[5] No court has adopted the proposition that the "made retroactive" decision could be reached by any court at all, such that a ruling by a single district court or court of appeals—or, perhaps, even a state court—that a new right is retroactive would satisfy the "if" clause for all Section 2255 applicants throughout the country. Nor is there any reason why Congress would have wanted to give such nationwide effect to decisions of courts that ordinarily have specific geographic jurisdiction (as do the federal courts of appeals) or jurisdiction over specific cases (as do federal district courts). Accordingly, the "made retroactive" decision is most naturally understood to require a decision by a court with jurisdiction over the particular Section 2255 motion—either this Court, the court of appeals with territorial jurisdiction over the Section 2255 motion, or the district court adjudicating the particular Section 2255 motion seeking to invoke paragraph 6(3).

[6] The Eleventh Circuit and other circuits have held that *Richardson* v. *United States*, 526 U.S. 813 (1999), should be applied retroactively on collateral review to cases that had become final before *Richardson* was decided. J.A. 23-24 (citing cases). In circuits in which the issue is open, the government has consistently taken the position that *Richardson* should not be applied retroactively because it does not "alter[] the range of conduct or the class of persons that the law punishes," *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2523 (2004), and does not otherwise come within an exception to the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989). This case, however, does not present any question concerning the retroactivity of *Richardson*, because the government has not sought to defend the court of appeals' judgment on the alternative ground that *Richardson* is not retroactive and the conflict in the circuits on which the petition was based concerns the meaning of paragraph 6(3), not the retroactivity of *Richardson*.

2. *When may a court decide that the right is retroactive?*

Another, more difficult interpretive issue arising from the "if" clause of paragraph 6(3) concerns whether the retroactivity ruling must precede the filing of an applicant's Section 2255 motion or whether, instead, the retroactivity ruling could be made by a court ruling on an applicant's own Section 2255 motion. Although the question is not free from difficulty, the latter interpretation is correct.

a. Although the "made retroactive" provision does not have a tense marker of "was" or "is" associated with it, the most natural reading is to extend the past tense of the first part of the "if" clause—"*has been* newly recognized by the Supreme Court"—to the second part—"and made retroactively applicable to cases on collateral review." It could therefore be argued that the date defined in paragraph 6(3) is available only if the right asserted in the Section 2255 motion "has been * * * made" retroactive before the motion was filed. Petitioner appears to adopt this view, when he argues (Br. 17) that "paragraph 6(3) does not reset the limitation clock unless a prisoner can show that a court 'already had made' the right asserted retroactive to collateral cases." See NACDL Amicus Br. 7 (similar).

That reading of the "if" clause would be consistent with the text of paragraph 6(3). It would also be consistent with this Court's construction in *Tyler* v. *Cain*,

supra, of a somewhat similarly worded provision governing second or successive habeas petitions. Under that provision, "[a] claim presented in a second or successive habeas corpus application * * * shall be dismissed unless * * * the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2244(b)(2)(A). The Court in *Tyler* held that, under that provision, "the District Court was required to dismiss [the second or successive habeas petition] unless [the prisoner] showed that this Court *already had made*" the new rule retroactive. 533 U.S. at 667 (emphasis added). A similar reading of "made retroactively applicable" in paragraph 6(3) would lead to the conclusion that a Section 2255 motion is untimely under paragraph 6(3) unless, at the time it is filed, a court already had made the new right retroactively applicable.

b. Although the Court could construe the "if" clause in paragraph 6(3) to require a holding of retroactivity before the Section 2255 motion is filed, that construction is ultimately in substantial tension with other parts of the statute. Section 2255 provides expressly that "[a] 1-year period of limitation shall apply to a motion under this section" and that "[t]he limitation period shall run from the latest of" the four events mentioned in the four subparagraphs of paragraph 6. Congress thereby intended a nationally uniform, one-year period for filing Section 2255 motions. Reading paragraph 6(3) to require a holding of retroactivity before a prisoner could file a Section 2255 motion, however, would conflict with that congressional goal. That is because of the unlikelihood that a court will be presented with the question of the retroactivity of a new rule—and will therefore have the opportunity to decide that it is retroactive—

immediately after the new rule is first recognized by this Court.

This Court is unlikely to hold a new right retroactive within a year of initially recognizing the right. It is possible, as the Court recognized in *Tyler*, that "the right combination of holdings" by this Court could "necessarily dictate retroactivity of the new rule" at the very time the Court initially recognizes the rule. 533 U.S. at 666; see *id.* at 669-670 (O'Connor, J., concurring); *id.* at 671-673 (Breyer, J., dissenting).[7] Aside from such exceptionally rare occurrences, however, it is very unlikely that cases could make it through the system on collateral review fast enough for this Court to reach a retroactivity ruling within a year of first recognizing the new rule.

The courts of appeals are also unlikely to hold a new right retroactive within a year of this Court's initial recognition of the right. To be sure, every prisoner has the one-year period in paragraph 6(1) from the date his conviction became final to file a timely Section 2255 motion. Thus, a prisoner whose conviction became final shortly before or shortly after this Court announces a new rule could make use of that period to file a Section 2255 motion in district court based on the new rule. But even such a motion is unlikely to reach and be adjudi-

---

[7] It is also possible that this Court could recognize a new right and hold it retroactive in a case in which the new right is presented to the Court in a case arising from a Section 2255 motion. In the federal system, however, that occurrence will be very rare. If the prisoner raised the claim on direct review and there has been no intervening change in the governing law, the court on Section 2255 will ordinarily reject the claim on law of the case or related grounds, while if the prisoner did not raise the claim on direct review, it will ordinarily be barred by the prisoner's procedural default. See *Withrow* v. *Williams*, 507 U.S. 680, 720-721 (1993) (Scalia, J., concurring in part and dissenting in part) (citing cases).

cated by a court of appeals within one year of this Court's decision recognizing the new rule.[8]

Assuming that paragraph 6(3) requires the retroactivity ruling to precede the filing of the Section 2255 motion, the result would be as follows: In the extraordinary situation in which this Court in effect holds a new rule retroactive in the case in which it is first announced, prisoners throughout the country would have the statutory period of one year from this Court's decision to file a Section 2255 motion. In all other cases, however, there would be either no time at all or there would be non-uniform periods of less than one year governing Section 2255 motions asserting the new right, depending on the circuit. Ordinarily, a prisoner would have no time at all to file a Section 2255 motion based on the new rule, because, as explained above, neither this Court nor the court of appeals with jurisdiction over the prisoner's Section 2255 motion will likely have had the opportunity to hold a new rule retroactive within one year of the new rule's announcement by this Court. Where a given circuit had been presented with a case raising the retroactivity issue and held the new right retroactive within a year of this Court's initial recognition of the new right, however, a prisoner in that circuit would have some period for filing a Section 2255 motion. But that period would be

[8] Although a district could easily make a retroactivity decision regarding a new rule within one year of the rule's announcement by this Court, decisions by a single district court are not binding in other cases—even within the same district. See 18 James Wm. Moore et al., *Moore's Federal Practice* ¶ 134.02[1][d] (3d ed. 2004). A district court's holding in a given case that a new rule is retroactive would therefore not provide a basis for anyone other than the party in that particular case to claim that the rule has been "made retroactive" under paragraph 6(3). Cf. note 5, *supra*.

likely to be much less than a year: it would run from the date of the circuit's retroactivity holding to the termination of the limitations period one year after this Court initially recognized the new right. Thus, the nationally uniform one-year period Congress envisioned in paragraph 6(3) would be either non-existent or, if it existed at all in some circuits, it would be a period of likely much less than a year and would vary depending on whether and when the particular circuit made a retroactivity decision.

As the court of appeals recognized, that result appears to be inconsistent with Congress's express provision for a "single, uniform statute of limitations" of one year. J.A. 29. Accordingly, the better view is that the "if" clause of paragraph 6(3) is satisfied so long as the newly recognized right is held to be retroactive by some court with jurisdiction over the petition—this Court, the court of appeals with territorial jurisdiction, or the court making the final decision in the particular applicant's own case. Each prisoner seeking to rely on a new rule would have the same, nationally uniform one-year period from the date of initial recognition of the rule by this Court to file a Section 2255 motion. See J.A. 27.

3. The date specified in the main clause is unaffected.

It bears emphasis that, however the interpretive questions arising from the "if" clause of paragraph 6(3) are resolved, the question presented in this case would not be affected. The interpretation of the "if" clause could affect whether a given Section 2255 applicant may rely on the paragraph 6(3) limitations period at all, *i.e.*, whether an applicant who *did* file within one year from "the date on which the right asserted was initially recognized by the Supreme Court" may rely on

paragraph 6(3) to establish the timeliness of his motion. But no interpretation of the "if" clause could save an applicant who *did not* file his Section 2255 motion within one year of the date the right was initially recognized by this Court. The clear text of paragraph 6(3) identifies that date as the one and only date from which to run the one-year period. The "if" clause sets a condition on the use of that date but does not authorize the use of any other date. Accordingly, no construction of the "if" clause could authorize a Section 2255 motion filed more than one year after initial recognition of a new right by this Court.

D. The Fact That Many Second Or Successive Section 2255 Motions May Be Time-Barred Is Not A Reason To Disregard The Text Of Paragraph 6(3)

Petitioner and his amici argue that running the limitations period from the date this Court initially recognizes a new right will "negatively impact a petitioner's ability to file a successive petition." NACDL Amicus Br. 9; see Pet'r Br. 23-26. A second or successive petition must be dismissed under 28 U.S.C. 2255 para. 8(2) unless it is certified to be based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." In *Tyler* v. *Cain*, this Court construed virtually identical language applicable to second or successive habeas petitions by state prisoners under 28 U.S.C. 2244(b)(2)(A) to require a district court to dismiss such a petition "unless [the prisoner] showed that this Court already had made [the rule relied upon] retroactive" at the time the petition was filed. 533 U.S. at 667. Petitioner and his amici argue that this Court will very rarely have the chance to decide that a new rule is retroactive within one year of initially recognizing it. They conclude that second or successive motions

will therefore either be dismissed under paragraph 8(2) (because this Court has not yet held the right asserted to be retroactive) or found untimely under paragraph 6(3) (because the prisoner waited for a retroactivity ruling by this Court that came more than one year after this Court initially recognized the right asserted).

As petitioner acknowledges and as already noted, there could be instances in which, by a combination of two decisions or otherwise, this Court in effect makes a new rule retroactive at the same time that it announces the rule. See p. 21 & note 7, *supra*. There may be other circumstances as well in which litigation moves forward with sufficient speed (or, perhaps, in which the relevant retroactivity issues are raised by already-pending Section 2255 motions) that a prisoner on a timely second or successive Section 2255 motion is able to obtain relief under paragraph 8(2).

The important point, however, is that very limited availability of relief on second and successive Section 2255 motions results from a "balancing of objectives (sometimes controversial), which is normally for Congress to make," between the competing goals of finality and collateral relief. *Lonchar* v. *Thomas*, 517 U.S. 314, 323 (1996); see *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996). In deciding that such second or successive motions should be narrowly limited, Congress likely recognized, as had Justice Harlan, that "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Mackey* v. *United States*, 401 U.S. 667, 691, (1971) (Harlan, J., concurring in the judgments in part and dissenting in part). Congress is entitled to base its limitations policy for second and

successive Section 2255 motions on that judgment and on the reality that even claims that are given retroactive effect could have been raised on direct review. The fact that paragraph 6(3) has the effect of severely restricting such motions is not an objection to the plain-meaning construction of that provision; it is, rather, a reflection of the balance that Congress struck.

E. The Limitations Period In Paragraph 6(3) Of One Year From The Date When This Court Initially Recognizes A New Right Is Based On Sound Policy Considerations

1. Statutes of limitations are based on the "basic policies of * * * repose, elimination of stale claims, and certainty." *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000). As this Court has long understood, permitting a claim to be "brought at any distance of time" would be "utterly repugnant to the genius of our laws." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

The finality interests underlying statutes of limitations are of particular importance to collateral review of criminal convictions. This Court has frequently noted the "profound societal costs" of collateral review of criminal convictions. *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)). Many of those costs have to do with the extended period for litigation afforded by collateral review. Collateral review "extends the ordeal * * * for both society and the accused." *Engle* v. *Isaac*, 456 U.S. 107, 127 (1982). It frustrates deterrence and rehabilitation, because effective deterrence depends on the expectation that punishment will be swift and sure, and successful rehabilitation requires the defendant to accept that he is justly subject to sanction and needs to be rehabilitated. *Id.* at 127 n.32. And "writs of habeas corpus frequently cost society the right to punish

admitted offenders," because the "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Id.* at 127-128; see *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991). While a grant of collateral relief "may, in theory entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution." *Isaac*, 456 U.S. at 128.

2. Taking into account those costs, the one-year limitations period in Section 2255 was intended to "reduce[] the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan* v. *Walker*, 533 U.S. at 179. Because "[f]inality is essential to both the retributive and the deterrent functions of criminal law," *Calderon*, 523 U.S. at 555, Congress determined that, although collateral review of federal criminal convictions should continue to be available, a reasonable one-year limitation period would ensure that the costs of collateral review are lessened by requiring reasonably prompt litigation of collateral claims.

Paragraph 6(3) embodies Congress's drawing of the appropriate balance. In addition to the ordinarily applicable one-year period after a conviction has become final under paragraph 6(1), paragraph 6(3) authorizes a further one-year period within which to bring Section 2255 motions based on a new right recognized by this Court after the defendant's conviction has become final. Congress determined that this Court's recognition of the new right may be sufficiently extraordinary to warrant reopening the finality of criminal convictions. In recognition of the severe costs of such long-delayed litigation, however, Congress retained the one-year

provision so that even litigation about the application of new rules will, with time, come to an end.

3. Petitioner's view that the one-year period runs from the date the right asserted is held to be retroactive would extend the time period for litigating already-old claims even further. It may take years—sometimes many years—before a court of appeals or this Court has the opportunity to decide whether a given newly recognized right is retroactive. Under petitioner's view, prisoners could wait that entire time —and then an additional year after the retroactivity holding—before they would have to file their Section 2255 petitions.[9] Moreover, the amount of time each prisoner could wait would vary by circuit, depending on when each circuit decides the retroactivity issue.

As the court of appeals recognized, Congress could have enacted a limitations period running from "the date on which a right newly recognized by the Supreme Court has been made retroactively applicable on collateral review." J.A. 26. But Congress's decision to require more timely filing of Section 2255 motions, based on the date the right was "initially recognized" by this Court, helps achieve the important goal of minimizing the heavy costs of such long-delayed litigation. That decision should be respected.

---

[9] Indeed, as petitioner and amicus NACDL appear to recognize, it is likely that, under petitioner's view of the "if" clause, most prisoners would *have* to wait until the right is held to be retroactive before filing a Section 2255 motion. See Pet'r Br. 17 ("[P]aragraph 6(3) does not reset the limitation clock [from the ordinary one-year-from-finality-of-conviction period] unless a prisoner can show that a court 'already had made' the right asserted retroactive to collateral cases."); NACDL Amicus Br. 26-27. It appears that the Section 2255 motion in this case, which was filed *before* the Eleventh Circuit held *Richardson* retroactive, would itself be untimely under petitioner's theory.

4. Petitioner advances a number of policy arguments, which essentially reduce to the contention that Congress should have drafted paragraph 6(3) differently to authorize a more relaxed time limit for filing Section 2255 motions based on newly recognized rights. As the Court has recognized, however, the AEDPA's limitations provisions reflect Congress's "legislative decision to establish stringent procedural requirements for retroactive application of new rules," and the Court "do[es] not have license to question the decision on policy grounds." *Tyler*, 533 U.S. at 663 n.5. Moreover, even as a matter of policy, Congress had substantial reasons not to adopt petitioner's proposal, which would authorize significant delay in bringing Section 2255 motions.

a. Petitioner argues (Br. 27) that his proposal—in which the limitations period runs from a decision holding a right to be retroactive—"provides for the possibility that the lower courts may make an incorrect retroactivity decision." Because prisoners could—or, indeed, would have to—await a decision that a new rule is retroactive before filing a Section 2255 motion, they would never find themselves in the situation of being bound by an unfavorable retroactivity decision in their own case that turns out to be mistaken. Petitioner argues that, if the limitations period instead runs from "the date on which the right asserted was initially recognized by the Supreme Court," 28 U.S.C. 2255 para. 6(3), prisoners may be forced to file their Section 2255 motions before the court of appeals or this Court has held the new rule at issue to be retroactive; prisoners may therefore become bound by an ultimately incorrect and transitory ruling that the new right is not retroactive.

Petitioner's argument is mistaken, for two reasons. First, while petitioner's proposal could indeed protect prisoners from mistaken non-retroactivity holdings, it would do so only by imposing a corresponding cost: petitioner's proposal would delay (sometimes by years) relief for those prisoners who are obviously entitled to relief under a new rule that should be held retroactively applicable. Such prisoners would have to wait until the new rule is held to be retroactive by the court of appeals or this Court before they could rely on paragraph 6(3) to establish that their filing is timely. Yet it is just those prisoners whom Congress was most likely to be concerned about in structuring paragraph 6(3) as it did.

Second, the "cost" petitioner hypothesizes is simply the cost of any rule that ultimately requires the termination of litigation by according finality, at some point, to the judicial resolution of a case. Under any rule of limitations—or any other rule that promotes finality and repose—some parties who ultimately could prevail on the basis of a new legal rule will be bound by the results of their earlier litigation or their earlier failure to litigate. In enacting paragraph 6(3) and many other provisions of AEDPA, Congress chose not to pursue the value of ultimate accuracy at all costs. Rather, it balanced the value of finality against the value of permitting continued litigation. The fact that paragraph 6(3) will lead to a termination of litigation over even new rules is not a reason to question the terms of that provision; rather it is a statement of the very purpose that Congress sought to achieve in enacting paragraph 6(3).

b. Petitioner also argues that running the one-year limitations period from the date of a decision holding a new right to be retroactive would "curb frivolous applications for collateral relief" based on rights that may never be held to be retroactive. Br. 28. Running the period from the date this Court initially recognizes a new right, in petitioner's view, would "encourage[] federal prisoners to file potentially frivolous section 2255 motions every time this Court issues a decision," because they will otherwise fear forever losing the ability to obtain relief. Br. 29; see NACDL Amicus Br. 21-28.

Running the one-year limitations period in paragraph 6(3) from the date this Court initially recognizes a new rule ensures that all claims based on the new rule are brought reasonably promptly after the rule is announced. Although that could result in some frivolous claims being brought based on rules that are clearly not retroactive, it will have the benefit of allowing the courts to decide the retroactivity issue promptly. Moreover, prisoners already have substantial incentives to bring Section 2255 motions whenever possible in the hope of obtaining shorter sentences or invalidating their convictions. Many such claims will therefore be brought, regardless of which rule the Court adopts in this case. The courts are likely not to have great difficulty disposing of frivolous applications for collateral review. But requiring all claims based on a given new rule to be brought promptly has the benefit of ensuring that the legal issues arising from the announcement of a new rule, including its retroactivity, are addressed and disposed of relatively quickly. Those entitled to relief may thereby receive it promptly, and the criminal justice system can otherwise return to achieving goals other than the relitigation of convictions that have long since become final.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2005

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Paragraph 6 of Section 2255 of Title 28 of the United States Code provides as follows:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

2. Paragraph 8 of Section 2255 of Title 28 of the United States Code provides as follows:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(8)

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No. 04-5286

IN THE

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MICHAEL DONALD DODD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United Stated Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In his initial brief, Mr. Dodd argued that the limitation period in paragraph 6(3) does not begin to run unless and until all three of its conditions have been satisfied. That is, the one year period does not begin to run until the right asserted "was initially recognized" by this Court, the right "has been newly recognized" by this Court, and the right has been "made retroactively applicable" to collateral cases. This interpretation fits comfortably with the plain language of paragraph 6(3) by giving meaning to all three of its requirements, and respects Congress' use of the past tense in defining those requirements. It also respects Congress' express creation of an exception to finality for new rights that apply retroactively,

by allowing for the realistic possibility of both initial and second or successive motions premised on such rights. Moreover, it assures the similar treatment of similarly-situated movants, and promotes judicial efficiency by limiting frivolous motions.

The Government concedes that paragraph 6(3)'s plain language states three requirements in the past tense, but argues its language also requires that the one-year period begins to run when, and only when, this Court initially recognizes the right asserted. This poses an interpretational dilemma for the Government. If the one-year limitation period begins to run with initial recognition, and Congress' use of the past tense is respected, paragraph 6(3) is reduced to a nullity, because retroactivity decisions almost always come more than a year after a decision of this Court initially recognizing a right. Even the Government admits that Congress could not have intended so absurd a result.

The Government's answer to this dilemma is to ask the Court to alter Congress' use of the past tense and rewrite paragraph 6(3)'s third requirement to read "*is* made retroactively applicable," thereby allowing the retroactivity determination to be made at some undefined point in the future. Of course, to rewrite the statute in the manner the Government suggests, the Court must not only ignore paragraph 6(3)'s plain language, and *Tyler v. Cain*, 533 U.S. 656 (2001), but also Congress' failure to enact the "is made retroactively applicable" language championed by the Government when it was stated in a predecessor proposal to paragraph 6(3).

But even with this rewriting, problems remain. The Government concedes that its interpretation of paragraph 6(3) virtually eliminates the possibility of a second or successive section 2255 motion premised on a new rule of constitutional law that applies retroactively to collateral cases. It also admits that its interpretation will likely result in the disparate treatment of similarly-situated movants. Finally, the Government

concedes that by allowing the retroactivity decision to be made at some point in the future, its interpretation of paragraph 6(3) will result in frivolous motions being brought based on rights that clearly are not retroactive.

In the end, the Government must turn to policy reasons to justify its drastic rewriting of paragraph 6(3), but these too fall short. At bottom, the Government asserts that Congress intended to interpose the shortest possible deadline for seeking review under section 2255. But that premise is belied by the very existence of paragraph 6(3) and paragraph 8(2) of section 2255, which allows for second or successive motions containing a new rule of constitutional law made retroactive to collateral cases. In both paragraphs 6(3) and 8(2), Congress provided an exception to finality based upon new, retroactively applicable decisions of this Court. To adopt the Government's view would be to believe that Congress intended to provide an avenue for relief based on these retroactively-applicable rights and yet drafted legislation that does not allow a realistic possibility for relief.

In sum, the Court should decline the Government's invitation to rewrite paragraph 6(3), and instead conclude that the triggering date for paragraph 6(3) is the date on which all three of its prerequisites have been satisfied—here, when the Eleventh Circuit decided in *Ross v. United States*, 289 F.3d 677 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 944 (2003), that this Court's decision in *Richardson v. United States*, 526 U.S. 813 (1999), was a right newly recognized by this Court that applied retroactively to collateral cases.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF PARAGRAPH 6(3) REQUIRES THE COURT TO ALTER CONGRESS'S USE OF THE PAST TENSE, IGNORE *TYLER V. CAIN*, ADOPT STATUTORY LANGUAGE REJECTED BY CONGRESS, AND RENDER SUPERFLUOUS PARAGRAPH 6(3)'S SECOND CLAUSE.

The Government argues that "[t]he unambiguous language of paragraph 6(4)'s [sic] main clause resolves this case," and, therefore, paragraph 6(3)'s one-year period of limitation runs from only one date—the "date on which the right asserted was initially recognized by the Supreme Court." Govt. Brf. 11, 12. This interpretation of paragraph 6(3), however, requires the Government to confront the purpose of its second clause: "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

The Government concedes that the "most natural reading" of the language in paragraph 6(3)'s second clause—"*has been* newly recognized by the Supreme Court and *made* retroactively applicable to cases on collateral review"—is that it is phrased in the past tense. Govt. Brf. at 19. The Government further concedes that reading the "made retroactively applicable" language in the past tense "would also be consistent with this Court's construction" of similar language in *Tyler v. Cain*, 533 U.S. 656 (2001). Govt. Brf. at 19-20. Moreover, the Government admits that if the one-year period of limitation begins to run with initial recognition, and Congress' use of the past tense is respected, "a Section 2255 motion is untimely under paragraph 6(3) unless, at the time it is filed, a court already had made the new right retroactively applicable." Govt. Brf. 20. Such an interpretation, the Government recognizes, would reduce paragraph 6(3) to a nullity, because retroactivity decisions almost always come more than a year

after a decision of this Court initially recognizing a right. Govt. Brf. 20-22. The Government admits that Congress could not have intended so absurd a result. Govt. Brf. 22-23.

The Government's answer to this dilemma is to ask the Court to hold "that the 'if' clause is satisfied so long as the newly recognized right is *held to be retroactive* by some court with jurisdiction over the petition." Govt. Brf. 23. Of course, to rewrite the statute in the manner the Government suggests, the Court must not only ignore paragraph 6(3)'s plain language and *Tyler*, but also Congress' rejection of a predecessor proposal to paragraph 6(3) that used the identical "*is* made retroactively applicable" language the Government now champions. *See* Violent Crime Control and Law Enforcement Act of 1995, S.3, 104th Cong. § 508 (1995) (emphasis added). The Court "ordinarily will not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language." *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (internal quotation marks omitted). It should not do so here. The Government's rewriting of paragraph 6(3) also requires this Court to overlook Congress' express use of the phrase "is made retroactively applicable" in 28 U.S.C. § 2264, another provision enacted by the Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L.104-132,110 Stat. 1214 (1996), but its failure to do so in paragraph 6(3).

Finally, rewriting paragraph 6(3) to allow the retroactivity decision to be made at some point in the future renders the second clause of paragraph 6(3) superfluous to any determination of the timeliness of the motion. The Government asserts that its view of paragraph 6(3)'s second clause does not render that clause mere surplusage,[1] because it "serves the

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[1] Inconsistently, the Government also argues that the phrase "has been newly recognized by the Supreme Court" in the second clause of paragraph 6(3) is surplusage because it "essentially just repeats the preceding phrase ('initially recognized by the Supreme Court')." Govt. Brf. 15. This

genuine function of explicitly identifying the cases in which the identified date is available to establish the timeliness of a Section 2255 motion." Govt. Brf. 15. But in reality, this "timeliness" determination is of no moment. If the "initially recognized" right relied upon to start the limitations period is a "new" right, then no collateral relief is available unless that right also applies retroactively. *Teague v. Lane*, 489 U.S. 288 (1989). If the new right does not apply retroactively, the fact that the motion would also be time-barred under paragraph 6(3) is inconsequential, because any entitlement to relief would already be barred by *Teague*.

Indeed, the Government's rewriting of the second clause of paragraph 6(3) significantly broadens the limitation provision's scope. If paragraph 6(3) is read to allow the one-year period to begin to run only on "the date on which the right asserted was initially recognized by the Supreme Court," a section 2255 movant could file a motion under paragraph 6(3) every time this Court issues a decision recognizing a right, regardless of whether that right is "new" or "made retroactively applicable." Although the Government describes its reading of paragraph 6(3) as "narrowly circumscribed," Govt. Brf. 15, it is, in reality, anything but.

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is incorrect. As the Eleventh Circuit noted, the common-sense and ordinary meaning of "initially" is "from the beginning" or "in the first place." JA 25 (citing *Webster's Third New International Dictionary* 1164 (1961)). In contrast, whether the right at issue is "newly recognized" is informed by this Court's jurisprudence under *Teague v. Lane*, 489 U.S. 288 (1989), as to when a constitutional rule of criminal procedure is "new." *See United States v. Hopkins*, 268 F.3d 222, 224-25 & n.2 (4th Cir. 2001); *Peterson v. Cain*, 302 F.3d 508, 511 (5th Cir. 2002). Indeed, as part of its "threshold" *Teague* analysis, a court may determine that a right, if it existed, would be both "new" and retroactively applicable, and yet decline to find the right exists—that is, decline to "initially recognize" the "new" right. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 329-330, 340 (1989). Accordingly, a "newly recognized" right is not necessarily an "initially recognized" right.

II. INTERPRETING PARAGRAPH 6(3) TO RUN UPON INITIAL RECOGNITION IS INCONSISTENT WITH ITS PURPOSE TO PROVIDE AN EXCEPTION TO FINALITY FOR THOSE FEW IMPORTANT NEW RIGHTS THAT APPLY RETROACTIVELY, AND ENCOURAGES THE FILING OF FRIVOLOUS MOTIONS.

Not only does the Government ask the Court to rewrite paragraph 6(3), but it asks the Court to do so in a way that runs contrary to Congress' very purpose in enacting paragraph 6(3)—to provide an exception to finality for prisoners seeking relief on claims premised on those few important decisions of this Court that have been held to apply retroactively to collateral cases, including such claims raised in second or successive motions. Given this purpose, the Government's interpretation of paragraph 6(3) is problematic.

First, the Government admits its view of paragraph 6(3) will virtually eliminate the possibility of second or successive motions premised on new rules of constitutional law, but argues that "balancing of objectives" is for Congress to make. Govt. Brf. 25. Mr. Dodd's interpretation of paragraph 6(3), however, requires no such "balancing," but instead allows for the realistic possibility of second or successive motions, and thereby respects Congress' decision, in enacting paragraph 8(2) of section 2255, to allow such motions.

Second, the Government concedes that its interpretation of paragraph 6(3) could result in disparate treatment of similarly-situated movants, because some prisoners may "become bound by an ultimately incorrect and transitory ruling that the new right is not retroactive." Govt. Brf. 29. Nonetheless, the Government asserts that the loss of the ability to obtain relief for some movants is less important than the delay in obtaining relief that might be suffered by others. Govt. Brf. 30. The Government inappropriately elevates concerns about delay over concerns about the uniform application of the law. This

Court's retroactivity jurisprudence, which forms the very basis for paragraph 6(3), is premised on the notion that the "harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated." *Teague*, 489 U.S. at 303-05, 315-16 (plurality opinion). Mr. Dodd's interpretation of paragraph 6(3) strikes the appropriate balance, in that it allows for the possibility that should a lower court make an incorrect retroactivity decision, that incorrect decision will only delay, not deny, the possibility of relief.

The Government also expresses concern that if the one-year period does not begin to run on the date that this Court initially recognizes the right asserted, this would yield different start dates for the limitation period in different jurisdictions, and therefore result in movants obtaining relief at different times. Govt. Brf. 28. But similarly-situated litigants obtain relief at different times in different jurisdictions every day; this is simply a function of the vagaries of the processing of cases by the courts. Indeed, prisoners raising collateral claims seeking the benefit of new decisions of this Court often obtain relief in different jurisdictions at different times, depending on when a given circuit court or this Court holds that the new right applies retroactively to collateral cases under *Teague*.

Finally, the Government admits that its reading of paragraph 6(3) would result in frivolous motions being brought based on rules that are clearly not retroactive, but argues that "[t]he courts are likely not to have great difficulty disposing of frivolous applications for collateral review." Govt. Brf. 31. The Court, however, should not underestimate the burden the Government's interpretation of paragraph 6(3) may place on the federal courts every time this Court issues a decision.

In fiscal years 1998-2004, an average of 68,472 defendants were convicted and sentenced each year by the United States District Courts. *See* Administrative Office of the United States Courts, Judicial Facts and Figures, Table 3.5, United

States District Courts, Criminal Defendants Disposed of by Method of Disposition, available at www.uscourts.gov/judicialfactsfigures/table3.05.pdf, updated with FY2004 information provided by the AO. For those same years, the number of motions to vacate sentence filed in the district courts is as follows:

Fiscal Year	Motions to Vacate Sentence
1998	6,287
1999	5,752
2000	6,341
2001	8,644
2002	6,107
2003	5,832
2004	7,137

See Administrative Office of the United States Courts, Judicial Facts and Figures, Table 2.9, United States District Courts, Prisoner Petitions Filed by Nature of Suit, available at http://www.uscourts.gov/judicial factsfigures/table2.09.pdf, updated with FY2004 information provided by the AO.

The marked increase in filings in fiscal years 2001 and 2004 demonstrate the potential impact of the Government's reading of paragraph 6(3). Not including those two years, an average of 6,063 section 2255 motions were filed each year. In FY2001, the number of filings increased by 42 %, to 8,644 motions. The Administrative Office of the United States Courts attributes this increase to the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Id.* In FY2004, which ended in September 2004, the number of section 2255 motions filed again increased noticeably, to 7,137. This increase likely represents the first wave of prisoner filings in response to the Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), which was issued in June 2004.

In light of the reading of paragraph 6(3) adopted by the minority of circuits and espoused by the Government, these prisoners likely felt compelled to file motions raising *Apprendi* and *Blakely* claims within a year of those decisions, because the failure to file might result in forfeiture of any possible right to relief. In contrast, under Mr. Dodd's view of paragraph 6(3), federal prisoners would not need to file until the resolution of the question of whether a new ruling by this Court applies retroactively. Given how few new rights are held to apply retroactively, this approach would dramatically limit the number of frivolous filings.

III. ALTHOUGH FILED BEFORE *ROSS* MADE *RICHARDSON* RETROACTIVELY APPLICABLE TO COLLATERAL CASES, MR. DODD'S MOTION IS TIMELY.

In summary, under paragraph 6(3), the one-year limitation period began to run on April 19, 2002, when the Eleventh Circuit held in *Ross v. United States*, 289 F.3d 677 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 944 (2003), that the Court's decision in *Richardson v. United States*, 526 U.S. 813 (1999), initially recognized a new right that was made retroactively applicable to collateral cases. Mr. Dodd therefore had until April 19, 2003 to file his section 2255 motion. Because he filed his motion more than two years *before* that date, on April 4, 2001, it was timely. The Government, however, asserts that because Mr. Dodd filed his motion before the Eleventh Circuit's decision in *Ross*, the motion was premature, and therefore untimely even under the reading of paragraph 6(3) Mr. Dodd proposes. Govt. Brf. 28 n.9. That is simply not the case.

On July 29, 2002, soon after the Eleventh Circuit issued its decision in *Ross*, Mr. Dodd filed with the district court a motion seeking leave to supplement his section 2255 motion under Federal Rule of Civil Procedure 15(d). Petitioner's

Motion for Leave to Supplement and Citation to Supplemental Authority. In his motion, Mr. Dodd notified the district court of the decision in *Ross* and argued that his motion was timely because the one-year limitation period did not begin to run under paragraph 6(3) until the date *Ross* was decided. *Id.*

Assuming Mr. Dodd's initial section 2255 motion was premature, the filing of his motion to supplement under Rule 15(d) cured any prematurity. A section 2255 motion may be amended or supplemented in the same manner as any other civil pleading under Federal Rule of Civil Procedure 15. *See* 28 U.S.C. § 2242; Rule 11, Rules Governing § 2255 Proceedings. Under Rule 15(d), a party may supplement a pleading to "set[] forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Fed. R. Civ. P. 15(d). Leave to supplement may be granted "even though the original pleading is defective in its statement of a claim for relief." *Id.* A motion to supplement under Rule 15(d) is the appropriate vehicle for curing a defective pleading—including one that is premature—where subsequent events effectively cure the deficiencies in the initial effort. *See*, 6A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1505 at 189-192 (2d ed. 1990); *Mathews v. Diaz*, 426 U.S. 67, 75 & n.8 (1976); *Franks v. Ross*, 313 F.3d 184, 198 (4th Cir. 2002). Accordingly, even assuming Mr. Dodd's initial section 2255 motion was premature, the filing of his motion to supplement under Rule 15(d) cured any prematurity. His motion is timely.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court of appeals, hold that Mr. Dodd's section 2255 motion is timely, and remand the case for consideration of the merits of Mr. Dodd's motion.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MICHAEL DONALD DODD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the one-year limitations period in 28 U.S.C. § 2255 para. 6(3) begins to run on the date on which this Court initially recognizes the asserted right, or whether it begins to run on the date on which all of the prerequisites in paragraph 6(3) are met?

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INTEREST OF AMICI CURIAE[1]

National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice.

National Association of Federal Defenders

The National Association of Federal Defenders (NAFD) is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of the Federal Defender Offices from across the country. The NAFD was formed in 1995 to enhance the representation provided under the Criminal Justice Act and the Sixth Amendment of the United States Constitution. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

Pursuant to the Criminal Justice Act, attorneys in the NAFD have been appointed by the federal courts to represent numerous indigent federal and state prisoners who have filed

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members or counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3.

motions under 28 U.S.C. §§ 2254 and 2255 seeking to have their sentences vacated and convictions overturned. The NAFD thus has a strong interest in ensuring that these defendants are not barred by an unduly restrictive interpretation of when the one year time period for filing such petitions begins to run. As the institutional defenders for indigent defendants, the NAFD also has a unique interest in all issues of federal criminal procedure, and a unique perspective to offer the Court concerning the statutory issues involved in interpreting 28 U.S.C. § 2254 and § 2255. In addition, the NAFD is particularly well positioned to anticipate on a practical level how differing interpretations of these statutes will affect indigent habeas petitioners.

STATEMENT

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), habeas petitioners may file a petition for relief once this Court has recognized a new rule and that new rule has been "made retroactively applicable." AEDPA provides, however, that petitioners must do so within one year. The question presented here is whether that one-year period begins to run at the time the Court issues its opinion recognizing the new rule or at the time that this Court or a court of appeals makes the new rule retroactive, when those dates differ.

Amici agree with petitioner Dodd that the statute can sensibly be read only to include retroactive application as a further condition or prerequisite to the filing of a habeas petition. Thus, the one-year period begins when this Court or the court of appeals holds that the new rule applies retroactively. Amici would add two important points to the AEDPA discussion. First, a reading of the statute that provides that the period of limitations begins to run when this Court issues the opinion recognizing the new rule would work a great unfairness due to the complexity of the retroactivity analysis. Second, such a rule necessitates the filing of

innumerable petitions that may not, in fact, be viable because the new rule is subsequently deemed not to be retroactive.

BACKGROUND

Michael Donald Dodd (Dodd) was convicted of, *inter alia*, engaging in a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 841 and 846. Dodd's conviction became final on August 6, 1997. On June 1, 1999, this Court held in *Richardson* v. *United States*, 526 U.S. 813, 815 (1999), that "a jury has to agree unanimously about which specific violations make up the 'continuing series of violations'" of a CCE charge. On April 4, 2001, Dodd filed a *pro se* motion under 28 U.S.C. § 2255 arguing that he was entitled to relief under *Richardson*. On April 19, 2002, the Eleventh Circuit held that *Richardson* recognized a new right that applies retroactively to cases on collateral review. *Ross* v. *United States*, 289 F.3d 677 (11th Cir. 2002) (per curiam), *cert. denied*, 537 U.S. 1113 (2003).

Dodd argued that his claim was timely under the AEDPA because the AEDPA's one-year statute of limitations period for his claim began to run on April 19, 2002, when the Eleventh Circuit made *Richardson* retroactively applicable to cases on collateral review. The court of appeals rejected Dodd's argument and held instead that "the one-year window of opportunity in which Dodd could have timely filed a habeas petition asserting the right recognized in *Richardson* opened on June 1, 1999, when that case was decided, and closed one year later." *Dodd* v. *United States*, 365 F.3d 1273, 1281 (11th Cir. 2004), *cert. granted*, 125 S. Ct. 607 (2004).

SUMMARY OF ARGUMENT

The Eleventh Circuit's interpretation of the AEDPA's statute of limitations provision, 28 U.S.C. § 2255 para. 6(3), is untenable in light of this Court's prior precedent and basic

canons of statutory construction. In *Tyler* v. *Cain*, 533 U.S. 656 (2001), this Court interpreted another provision of the AEDPA, the successive habeas provision for state prisoners in 28 U.S.C. § 2244(b)(2)(A). In that case, the Court held that the phrase "made retroactive" in the successive habeas provision, means "held" to be retroactive. The statute in question here contains nearly identical language, to wit "made retroactively applicable." 28 U.S.C. § 2255 para. 6(3). In light of the Court's interpretation in *Tyler*, the Eleventh Circuit's interpretation of the phrase "made retroactively applicable," which can not be meaningfully distinguished from the phrase "made retroactive," can not be sustained. Moreover, according to the Eleventh Circuit's interpretation, the phrase, "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," is mere surplusage.

Additionally, the Eleventh Circuit's rule can not be upheld because it will force some petitioners to bring their claim based on the new rule twice, both as an initial habeas petition and as a successive habeas petition. The Eleventh Circuit's rule forces petitioners to hastily file petitions within one year of the Supreme Court's announcement of a new rule, even if no court has ruled on retroactivity. It thus creates the risk that many petitioners will be harmed by an incorrect determination of non-retroactivity. If this Court or the court of appeals determines that the new rule applies retroactively, petitioners who have already filed and been denied relief will essentially be forced to file a successive petition in order to obtain relief. That relief, however, is much harder to obtain under the successive petition standard. The successive habeas petition standard, unlike the initial petition standard, requires that the new rule be one of constitutional law and that the Supreme Court has held that the new rule applies retroactively. These condititions may not be satisfied in many cases.

Further, the Eleventh Circuit's rule can not be sustained for policy reasons. The Eleventh Circuit's rule is both unfair and inefficient because it places the burden of arguing retroactivity on *every* petitioner seeking application of a new rule, most of whom are proceeding *pro se*. It requires petitioners to file within one year of the Supreme Court's decision or lose their right to do so. The Eleventh Circuit's rule, in turn, requires the state and federal courts to waste its resources adjudicating potentially thousands of petitions based on rules that do not apply retroactively. If a petitioner bases his claim for relief on a new rule announced by this Court, he only has a right to relief if that new rule has been "made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255 para. 6(3). As retroactivity is a complex doctrine, however, it is patently unfair to require petitioners to argue both that the new rule entitles them to relief and that the new rule applies retroactively, without guidance from the courts. Dodd's rule would result in a much more orderly process of determining retroactivity because prisoners would be entitled to wait until the new rule has been held to apply retroactively before filing based on the new rule.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S RULE IS UNTENABLE, UNFAIR, AND WASTEFUL BECAUSE IT REQUIRES HABEAS PETITIONS TO BE FILED BEFORE THE CRITICAL RETROACTIVITY DECISION HAS BEEN MADE

A. *Tyler* v. *Cain* Is Controlling Authority Governing The Interpretation Of 28 U.S.C. § 2255 Paragraph 6(3)

The interpretation of the AEDPA's statute of limitations provision for new rules is controlled by this Court's decision in *Tyler* v. *Cain*, 533 U.S. 656 (2001). In *Tyler*, this Court

interpreted the AEDPA's successive habeas provision for state prisoners, 28 U.S.C. § 2244(b)(2)(A). This is a gatekeeper provision for successive claims that rely on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* The Court held that, under the plain meaning rule, the term "'made retroactive'" means "'held'" to be retroactive. *Tyler*, 533 U.S. at 662. Thus, the Court found that a successive petition based on a new constitutional rule would only be permissible if the Supreme Court "has *held* that the new rule is retroactively applicable to cases on collateral review." *Id.* (emphasis added).

Three years later, in *Dodd* v. *United States*, 365 F.3d 1273 (11th Cir. 2004), the Eleventh Circuit interpreted a similar AEDPA gatekeeping provision: the statute of limitations for federal prisoners seeking to file a petition based on a new rule, specified in 28 U.S.C. § 2255 para. 6(3). Section 2255 para. (6)(3) provides a one-year period of limitation that runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and *made retroactively applicable* to cases on collateral review." 28 U.S.C. § 2255 para. 6(3) (emphasis added). Dodd argued that the one year statute of limitations began to run when the court of appeals held that the new rule applied retroactively. The court of appeals rejected Dodd's argument and held that the one-year statute of limitations in 28 U.S.C. § 2255 para. 6(3) begins to run when the Supreme Court announces a new rule, not when retroactivity is decided. *Dodd*, 365 F.3d at 1281.

Ignoring *Tyler* and the plain language of the statute, the Eleventh Circuit declared that "Congress was simply reiterating the obvious: that § 2255(3) provides a narrow exception which can be relied upon only when the new right recognized by the Supreme court *can be retroactively applied* on collateral review." *Dodd*, 365 F.3d at 1279 (emphasis added). The decision in *Tyler*, however, forecloses such an

interpretation. No sensible distinction exists between the phrase "made retroactive" and the phrase "made retroactively applicable." Because this court has a "duty to construe statutes, not isolated provisions," the Eleventh Circuit's assertion that the phrase "made retroactively applicable" means that the new right might someday be applied retroactively can not be sustained. *Gufstafson* v. *Alloyd Co.*, 513 U.S. 561, 568 (1995) (citing *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975)).

Furthermore, the AEDPA "is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout." *Id.* at 569 (holding that the term "prospectus" must have the same meaning under §§ 10 and 12 of the Securities Act of 1933). Thus, this Court's interpretation of "made retroactive" must apply not only to § 2244, but to § 2255 as well. Congress could not have intended for "made" to be interpreted one way in § 2244 and another way in § 2255. Surely, Congress is aware of the fact that it used "made" in other parts of AEDPA. If Congress had disapproved of the Court's interpretation of "made" in § 2244, it could have amended the statute in the three years that have passed since this Court's decision in *Tyler*. Additionally, if Congress meant for "made" to mean something different in § 2255, it could have amended that section. Instead, Congress has left the language unchanged since the Court's decision in *Tyler*.

The Eleventh Circuit's decision in *Dodd* fails to even cite *Tyler*, let alone offer a justification as to why *Tyler* is not controlling. Certainly a reasonable habeas petitioner is entitled to rely on this Court's interpretation of nearly identical language in deciding when to file his petition. This Court has held that its opinions are not automatically rendered retroactive just because the Court has announced principles of retroactivity. *See Tyler*, 533 U.S. at 663. Therefore, under the Court's jurisprudence, the absence of a specific retroactivity holding means that no basis for a petition exists.

Thus, the only conclusion that can be drawn is that the statute of limitations does not begin to run until there is a holding providing for the retroactivity of the new rule.

To hold otherwise would mean that the phrase "if that right has been newly recognized by the Supreme Court *and* made retroactively applicable to cases on collateral review" has no meaning and is mere surplusage. 28 U.S.C. § 2255 para. 6(3) (emphasis added); see *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (explaining the Court's reluctance to "'treat statutory terms as surplusage'" particularly where the "term occupies so pivotal a place in the statutory scheme"); *Babbit* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 697-98 (1995) (utilizing the rule against surplusage in interpreting the Endangered Species Act). The qualifying phrase, "made retroactively applicable" is just that, a further condition in a conjunctive sentence that a petitioner must also satisfy in order to present a procedurally valid petition. The logical structure of the statute, therefore, is that a habeas petitions is procedurally valid only if both (1) the Court has newly recognized the right and (2) that right has been held to be retroactively applicable.[2]

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[2] The Eleventh Circuit's interpretation only makes sense in the limited circumstance where both conditions are satisfied by one opinion of the Court, that is, the Supreme Court announces a new rule and makes that rule retroactively applicable at the same time. Such events do occur in rare habeas cases. *See, e.g.*, *Penry* v. *Lynaugh*, 492 U.S. 302, 329 (1989) (explaining that if the Court were to hold that the Eighth Amendment prohibits the execution of mentally retarded persons, that would be a "new rule" that would apply retroactively to cases on collateral review) (O'Connor, J.), *overruled on other grounds by Atkins* v. *Virginia*, 536 U.S. 304 (2002). If the new rule was announced in a case on direct review, however, any discussion of retroactivity would be purely advisory. *Teague* v. *Lane*, 489 U.S. 288, 316 (1989). In such instances, a determination of retroactivity is left for another day.

B. The Eleventh Circuit's Rule Will Negatively Impact A Petitioner's Ability To File A Successive Petition

The implications of the Eleventh Circuit's rule are far reaching. Most devastating is the impact that the Eleventh Circuit's rule will have on federal prisoners' successive habeas petitions. AEDPA permits a second or successive motion only if it involves "a new rule of *constitutional law*, made retroactive to cases on collateral review *by the Supreme Court*, that was previously unavailable." 28 U.S.C. § 2255 para. 8(2) (emphasis added). Thus, where the new rule is statutory as opposed to constitutional or has been made retroactive by the court of appeals as opposed to the Supreme Court, relief is unavailable under the successive petition provision. The Eleventh Circuit's rule requires a petitioner to file as soon as this Court announces a new rule, without regard to whether that rule has been made retroactive. If the district court finds that the new rule does not apply retroactively, it will dismiss the petition on the merits. Therefore, a later ruling by the court of appeals holding that the rule does in fact apply retroactively could potentially leave some petitioners without a remedy for what is clearly a meritorious claim

Courts of appeal have struggled with the unfairness that results from their inability to grant habeas relief on successive petitions where the Supreme Court has overruled the circuit court's interpretation of a statute. In an attempt to address this situation, they have looked to the savings clause, which provides relief under § 2241 where the petitioner can demonstrate that the remedy provided for under § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255 note. A number of circuits have formulated tests for the savings clause. See *Reyes-Requena* v. *United States*, 243 F.3d 893, 902-03 (5th Cir. 2001) (collecting cases). As noted by the Fifth Circuit in *Reyes-Requena*, the majority of the tests require a claim of actual innocence and a

showing that the right has been made retroactive. *Id.* at 903. The Eleventh Circuit has created its own even more stringent three-part test that provides that the savings clause applies when: (1) a claim is based upon a retroactively applicable Supreme Court decision; (2) the holding of the Supreme Court decision establishes that the petitioner was convicted for an offense that is now nonexistent; and (3) circuit law foreclosed such a claim at the time it otherwise should have been raised in the trial, appeal, or first § 2255 motion. *Wofford* v. *Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999).

The Eleventh Circuit applied its savings clause test to *Richardson* claim in *Sawyer* v. *Holder*, 326 F.3d 1363 (11th Cir. 2003), *cert. denied*, 540 U.S. 900 (2003). The Eleventh Circuit held that although *Richardson* changed the elements of a CCE offense, it "did not invalidate CCE offenses" such that Sawyer was "convicted of a nonexistent offense." *Id.* at 1365-66. Accordingly, the Eleventh Circuit held that Sawyer "could not demonstrate that § 2255 was inadequate or ineffective to test the legality of his conviction." *Id.* at 1367.

The combination of the Eleventh Circuit's statute of limitations rule articulated in *Dodd* and its savings clause rule articulated in *Wofford* can only be described as a legal "Catch-22." If this Court interprets a federal criminal statute, but does not decide if its interpretation applies retroactively; the Eleventh Circuit's rule would require that a habeas petitioner file within one year of that ruling, even if *no* retroactivity decision has been made. For example, if petitioner A files his initial habeas petition on the basis of a newly recognized statutory right prior to a retroactivity determination and the court decides that the petition should be denied because the new rule should not apply retroactively, the petition is denied on the merits.[3] If, in petitioner B's later

[3] Because the first adjudication of the petition is deemed to be on the merits, it would not fall under one of the situations where this Court has explained that a later petition is not "second or successive." Those situations include: (1) where the later petition raises the same grounds as a previous petition that had been dismissed as premature, *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 643-46 (1998); and (2) where a state prisoner's later petition raises the same grounds as a previous petition that had been dismissed for failure to exhaust state remedies, *Slack* v. *McDaniel*, 529 U.S. 473, 487 (2000).

case, the court of appeals decides that the new rule should apply retroactively to cases on collateral review, petitioner A is precluded from seeking relief on what is clearly a meritorious claim simply because he filed too soon. This is because the claim would not satisfy the more stringent successive habeas petition standard in that it (1) would rely on a new statutory rule, not a new rule of *constitutional law*, AND (2) the new rule would not have been made retroactive *by the Supreme Court*. Even if this Court granted cert in a case applying its decision retroactively and, thus, cured the second problem by holding that the new rule applied retroactively, the first problem would remain.

The Eleventh Circuit's savings clause test would then come into play, but would not save petitioner A from the harm that was caused by him filing too soon because the claim would not be allowed. As illustrated above, under the Eleventh Circuit's rules, where the new rule of law is based on this Court's interpretation of a federal criminal statute (as opposed to the invalidation of the statute in its entirety), relief would be unavailable by either successive petition or § 2241. This conundrum can be prevented simply by allowing petitioners to wait to file their habeas petitions until after the retroactivity decision has been made.

Dislodging this bar created by the Eleventh Circuit only ensures a fair opportunity to seek relief, it neither guarantees relief nor creates undue delay. Petitioners would still have to get over the hurdle of procedural default before their claims could proceed. See *Bousley* v. *United States*, 523 U.S. 614, 622 (1998) (explaining that a first § 2255 motion must meet

the cause and prejudice standard if it presents a claim not made earlier).[4] Thus, the Eleventh Circuit's rule in *Dodd* is nothing more than an unnecessary hurdle in what is already a difficult road to relief.

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[4] This Court has held "that a claim that 'is so novel that its legal basis is not reasonably available to counsel' may constitute cause for a procedural default." *Bousley*, 523 U.S. at 622 (quoting *Reed* v. *Ross*, 468 U.S. 1, 16 (1984)). The finding of a "new rule" for purposes of the retroactivity analysis, however, does not also mean that the petitioner has shown cause to justify his failure to raise his claim on direct appeal. The two standards simply do not overlap. For purposes of the *Teague* analysis, a rule is new so long as the precedent existing at the time of the defendant's conviction did not dictate the rule. This is a less rigorous requirement than that for showing cause in order to justify procedural default. In *Bousley*, this Court elaborated on what constitutes a novel claim. In that case, Bousley claimed on collateral review that his guilty plea for "using" a firearm in violation of 18 U.S.C. § 924(c)(1) was not knowing and intelligent because the district court misinformed him of the nature of the charged crime. Bousley's claim was based on the fact that, five years after his conviction, the Supreme Court held in *Bailey* v. *United States*, 516 U.S. 137, 144 (1995), that § 924(c)(1)'s "'use'" prong requires the Government to show "'active employment of the firearm,'" rather than mere possession. *Bousley*, 523 U.S. at 616. Although the Court recognized that its holding in *Bailey* changed the relevant legal landscape, it held that Bousley's claim was not novel. The Court reached this conclusion because other defendants had previously challenged their § 924(c)(1) convictions on grounds that "use" required more than the mere possession of a firearm. *See id.* at 622-23. The Court further rejected Bousley's argument that his failure to raise the claim on direct review "should be excused because, before *Bailey*, any attempt to attack [his] guilty plea would have been futile." *Id.* at 623 (internal quotation marks omitted, alteration in original). Instead, the Court stated that "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." *Id.* (internal quotation marks omitted) (citing *Engle* v. *Isaac*, 456 U.S. 107, 130 n. 35 (1982)).

C. The Eleventh Circuit's Rule is Unfair Because It Requires Petitioners To Predict The Outcome Of The Court's Retroactivity Analysis

The "Great Writ" Habeas Corpus, is based on the principle that "in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay* v. *Noia*, 372 U.S. 391, 402 (1963), *overruled in part by Wainwright* v. *Sykes*, 433 U.S. 72 (1977). When the law changes, the problem of retroactivity arises; a court must determine if the new rule of law should be applied to events arising before it was announced. This Court has explained that a decision is not made retroactive simply because the Court has established principles of retroactivity. *Tyler*, 533 U.S. at 663. The Eleventh Circuit's rule, however, places the burden on prisoners to predict whether the change in law will apply retroactively. For obvious reasons, however, retroactivity is a complicated area of the law.[5]

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[5] This Court's retroactivity doctrine has a long and complicated history which began in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), *overruled by Griffith* v. *Kentucky*, 479 U.S. 314 (1987), where the Court faced the issue of whether the new constitutional rule announced in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), providing that illegally obtained evidence is inadmissible in criminal trials, should apply retroactively to habeas corpus proceedings. *Linkletter*, 381 U.S. at 644. The Court determined that the United States Constitution neither prohibits nor requires the retroactive effect of new rules. *Id.* at 629. In addition, the Court held that a reviewing court must weigh the merits and demerits in each case to determine if a new rule should apply retroactively. *Id.* The Court promulgated a three-pronged balancing test for reviewing courts to follow to determine if new rules should apply retroactively on collateral review. The reviewing court should consider the prior history of the new law, the purpose and effect of the law, and whether retrospective operation of the rule would further or retard its operation. *Id.* *Linkletter* remained the standard for retroactivity on collateral review for over twenty years. The Court's current retroactivity doctrine, however, was deeply influenced by Justice Harlan's

Further, a full 93% of habeas petitioners proceed *pro se*. See *Duncan*, 533 U.S. at 186 (Breyer J., dissenting) (citing statistics). Consequently, unrepresented habeas petitioners must not only argue that the new rule entitles them to relief, but must also argue that the new rule applies retroactively. The Eleventh Circuit's rule unnecessarily endangers the integrity of the "Great Writ" because it ensures that there will be a greater number of petitioners whose petitions will be denied based upon inartfully drafted retroactivity arguments, rather than the merits of their claims.

Any attempt to argue that a new rule applies retroactively would likely begin with an examination of *Teague* v. *Lane*, 489 U.S. 288 (1989), where the Court articulated the modern version of the retroactivity doctrine. In *Teague*, the Court faced the issue of whether the new constitutional rule announced in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) -- that under the Sixth Amendment the jury venire must be drawn from a fair cross section of the community -- applied retroactively to cases on collateral review. The Court held that a state prisoner seeking collateral relief under the federal habeas statute could not base his claim upon a "new" rule of constitutional criminal procedure established after the date on

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dissenting opinions in *Desist* v. *United States*, 394 U.S. 244 (1969), *overruled by Griffith* v. *Kentucky*, 479 U.S. 314 (1987), and *Mackey* v. *United States*, 401 U.S. 667 (1971). Justice Harlan argued that new constitutional rules should not apply retroactively to cases on collateral review except in two limited circumstances. *Id.* at 676 (Harlan, J., concurring in part and dissenting in part). The first exception allowed new substantive due process rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" to be applied retroactively. *Id.* at 692. The second exception was for the nonobservance of procedures that are "'implicit in the concept of ordered liberty.'" *Id.* at 693. The Court re-examined the *Linkletter* standard in *Teague* v. *Lane*, 489 U.S. 288 (1989), where it explained that the *Linkletter* standard had led "to unfortunate disparity in the treatment of similarly situated defendants on collateral review." *Id.* at 305 (O'Connor, J.).

which his state conviction became final. *Teague*, 489 U.S. at 310.

The Court defined a "new rule" as any rule not "*dictated* by precedent existing at the time the defendant's conviction became final." *Id.* at 301 (O'Connor, J.). The Court articulated two instances where new rules will apply retroactively on collateral review. *Id.* at 305. First, a new rule should apply retroactively if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* at 311 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part)). Second, a new rule should be applied retroactively if the rule requires observance of "'those procedures that . . . are "implicit in the concept of ordered liberty."'" *Id.* (ellipsis in original) (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)). The Court noted that the second exception should be limited to watershed rules of criminal procedure. *Id.* Although § 2255 was not directly addressed in the opinion, the Courts of Appeal have uniformly held that the *Teague* retroactivity doctrine applies to both § 2254 and § 2255 habeas petitions. *United States* v. *Swindall*, 107 F.3d 831 (11th Cir. 1997) (per curiam) (collecting cases).

The retroactivity analysis is further complicated by the AEDPA, which was enacted in 1996 and completely revised collateral relief for state and federal prisoners under §§ 2254 and 2255. The AEDPA did not remove the *Teague* bar to retroactivity. *Horn* v. *Banks*, 536 U.S. 266 (2002) (per curiam) ("The AEDPA and *Teague* inquiries are distinct. . . . [I]n addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state."). Instead, under the revised § 2255, relief remains unavailable for a defendant relying upon a ruling handed down after his conviction became final, unless the ruling falls within one of the narrow exceptions defined by

Teague and its progeny. An applicant under § 2255, however, is not barred from raising claims based on new rulings that interpret the reach of a substantive offense rather than regulate procedure. If a defendant is convicted for conduct that this Court later declares does not constitute a federal offense, *Teague* will not bar his motion for relief under § 2255. *Bousley* v. *United States*, 523 U.S. 614 (1998). *Teague* only comes into play where the new rule is procedural rather than substantive. Thus, the distinction between substantive and procedural rules is critical in the retroactivity determination.

The distinction between substantive and procedural rules is often difficult, however, and some cases do "not fall neatly under either the substantive or procedural doctrinal category." *United States* v. *Woods*, 986 F.2d 669, 677 (3d Cir. 1993). For *Teague* purposes, substantive judgments are not simply those that decriminalize certain conduct but include those that alter the meaning and scope of a statute. *Bousley*, 523 U.S. at 620. Procedural rules are those that implicate how the trial process functions. *Id.* The Court has stated that new substantive rules – including both "decisions that narrow the scope of a criminal statute by interpreting its terms" and "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish" – "'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him." *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2522-23 (2004) (quoting *Bousley*, 523 U.S. at 620). The Court has explained that procedural rules "generally do not apply retroactively" because "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 2523. The Court characterized this as a "more speculative connection to innocence." *Id.*

This case directly involves this Court's interpretation of a federal statute, 21 U.S.C. § 848, in *Richardson*. The Courts of Appeal have uniformly held that *Richardson* is a new rule that applies retroactively to cases on collateral review because "the Court changed the elements of a CCE offense and, thus, changed the meaning of that statute." *Ross*, 289 F.3d at 681; see also *Santana-Madera* v. *United States*, 260 F.3d 133, 139 (2d Cir. 2001); *United States* v. *Lopez*, 248 F.3d 427, 432 (5th Cir. 2001); *Lanier* v. *United States*, 220 F.3d 833, 838 (7th Cir. 2000); *Murr* v. *United States*, 200 F.3d 895, 906 (6th Cir. 2000). Thus, the rule announced in *Richardson* was substantive. While this case involves the interpretation of a federal criminal statute that is not subject to the rules of *Teague*, the Eleventh's Circuit rule would also reach new rules that fall under *Teague*.

The application of *Teague* has been less than predictable. This Court has broadly defined "new rule" to include not only a rule that "'breaks new ground'" or overrules an earlier holding, but also decisions that extend the reasoning of prior cases. *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990). Further, the Court has found that a rule is not dictated by precedent if there exists a conflict of authority or if reasonable judges could disagree as to the proper rule. *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990). Even a member of this Court has recognized that "[d]istinguishing new rules from those that are not new under our post-*Teague* jurisprudence is not an easy task." *O'Dell* v. *Netherland*, 521 U.S. 151, 173 (1997) (Stevens, J., dissenting). If it is a difficult task for judges, then it is a next to impossible task for prisoners proceeding *pro se*.

As this Court and the courts of appeal tend to categorize many rules as new, petitioners would have to argue that the new rule is retroactive under one of the two *Teague* exceptions. Once a rule is categorized as new, however, petitioners face an uphill battle. This Court has rarely invoked the *Teague* exceptions to hold a new rule

retroactively applicable. Because retroactivity is considered as a threshold matter in habeas cases, the Court determined in *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1990), *overruled on other grounds by Atkins* v. *Virginia*, 536 U.S. 304 (2002), that a "new rule" barring the execution of mentally retarded persons would fit within *Teague's* first exception. The Court nevertheless went on to hold, however, that the Eighth Amendment did not prohibit the execution of mentally retarded persons. *Penry*, 492 U.S. at 335. Thus, the Court's finding that such a rule would fit into *Teague's* first exception was purely theoretical. In refusing to apply the first *Teague* exception to other new rules, the Court has often said that the new procedural rule "would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons." *Saffle*, 494 U.S. at 495.

Unlike the first exception, this Court has yet to hold that a new rule qualifies under the second *Teague* exception.[6]

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[6] *O'Dell*, 521 U.S. at 161 (holding that the rule entitling a death-eligible defendant to a jury instruction telling the jury that he is ineligible for parole would be a "new rule" that does not meet *Teague's* second exception); *Gray* v. *Netherland*, 518 U.S. 152, 170 (1996) (holding that the rule requiring the state to give notice to a defendant of the evidence it plans to present at a sentencing hearing would be a "new rule" that does not satisfy *Teague's* second exception); *Lambrix* v. *Singletary*, 520 U.S. 518, 539 (1997) (holding that the rule governing relief available when judge and jury weigh invalid aggravating factors when handing down a death sentence would be "new," but not a "watershed," rule); *Goeke* v. *Branch*, 514 U.S. 115, 120 (1995) (per curiam) (holding that the rule granting substantive due process protection against the required dismissal of a fugitive's appeal would be a "new" rule that is not "'so central'" as to fit within *Teague's* second exception); *Caspari* v. *Bohlen*, 510 U.S. 383, 396 (1994) (holding that the double jeopardy rule preventing a state from twice subjecting a defendant to a noncapital sentencing hearing would be a "new," but not a "watershed," rule); *Gilmore* v. *Taylor*, 508 U.S. 333, 345 (1993) (holding that the rule requiring an express jury instruction that precluded the jury from returning a murder conviction if it concluded that the defendant possessed a mitigating mental state would be "new," but not a "watershed," rule); *Graham* v. *Collins*, 506 U.S. 461, 478 (1993)

Although no rule has qualified under *Teague's* second exception, the Court has stated that the rule announced in *Gideon* v. *Wainwright*, 372 U.S. 335, 348 (1963), holding that defendants in all felony criminal prosecutions have the right to counsel, is an example of the type of rule that would be covered by *Teague's* second exception. *Saffle*, 494 U.S. at 495. In *Teague*, however, the Court specifically noted that it is unlikely that a rule encompassing the basic components of due process, such as the *Gideon* rule, has yet to emerge. *Teague*, 489 U.S. at 313. The cases where the Court refused to apply *Teague's* second exception, however, contained vigorous dissenting opinions.[7] Several lower courts have applied *Teague's* exception, but only a few have found a rule to satisfy the exception.[8]

(holding that the Fourteenth Amendment due process right not to have a sentencing jury follow the state's three-question procedure would be a "new rule" that is not a "watershed rule"); *Sawyer v. Smith*, 497 U.S. 227, 241-43 (1990) (holding that the Eighth Amendment rule prohibiting the imposition of a death sentence by a sentencer with a false sense of responsibility would be a "new rule," but not a "watershed" rule); *Butler*, 494 U.S. at 416 (holding that the rule that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in a separate investigation is a "new rule," but not a "watershed" rule); *Saffle*, 494 U.S. at 495 (holding that the Eighth Amendment right to allow a jury to base its sentencing decision on sympathy is not a "watershed rule").

[7] *See, e.g., O'Dell*, 521 U.S. at 171 (Stevens, J., dissenting) (stating that the *Simmons* rule "is surely a bedrock procedural element of a full and fair hearing"); *Saffle*, 494 U.S. at 507 (Brennan, J., dissenting) (stating that a rule that allows the jury to base its sentencing decision in a capital case upon sympathy for the defendant "must apply retroactively under the second *Teague* exception."); *Sawyer*, 497 U.S. at 254 (Marshall, J., dissenting) (stating that the *Caldwell* rule fits into *Teague's* second exception because "it is a rule 'without which the likelihood of an accurate [verdict] is seriously diminished'") (quoting *Teague*, 489 U.S. at 313).

[8] *Humphrey* v. *Cain*, 120 F.3d 526, 529 (5th Cir. 1997) (recognizing that the rule in *Cage* v. *Louisiana*, 498 U.S. 39 (1990), *overruled by Estelle* v. *McGuire*, 502 U.S. 62 (1991), satisfies the second exception to *Teague*, yet holding that prior Fifth Circuit precedent prevents a

The disagreement within the Court, as well as the inconsistent application of *Teague* in the lower courts, demonstrates the difficulty of the analysis required by *Teague*. To successfully argue that a rule should be applied retroactively, a petitioner must convince the court that the rule falls outside of *Teague* because it is substantive. The petitioner must also argue, in the alternative, that if the new rule is procedural then it is covered by one of the *Teague* exceptions. In addition to making these sophisticated legal

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satisfaction of *Teague's* second exception in habeas cases and requesting en banc consideration), *rev'd on reh'g*, 138 F.3d 552 (5th Cir. 1998) (en banc); *Adams* v. *Aiken*, 41 F.3d 175, 178-79 (4th Cir. 1994) (finding the *Cage* rule to satisfy *Teague's* second exception); *Nutter* v. *White*, 39 F.3d 1154, 1156 (11th Cir. 1994) (holding that the rule in *Cage*, satisfied *Teague's* second exception; the *Cage* case involved a jury instruction that defined reasonable doubt as "'substantial doubt'" and "'grave uncertainty,'" and therefore violated due process); *Williams* v. *Dixon*, 961 F.2d 448, 456 (4th Cir. 1992) (holding that a jury instruction requiring the jury to unanimously find mitigating evidence constituted a new rule of criminal procedure that qualified under *Teague's* second exception); *Graham* v. *Hoke*, 946 F.2d 982, 993 (2d Cir. 1991) (holding that the rule in *Cruz* v. *New York*, 481 U.S. 186 (1987), which prevents an "admission of a nontestifying codefendant's confession even if that confession interlocks with that of the defendant" falls under the second exception to *Teague*); *Ostrosky* v. *Alaska*, 913 F.2d 590, 594 (9th Cir. 1990) (holding that a defendant's right to rely on a lower court's finding of a statute's unconstitutionality in that defendant's case constitutes a new rule that qualifies under *Teague's* second exception); *Hall* v. *Kelso*, 892 F.2d 1541, 1543 n.1 (11th Cir. 1990) (stating that "a burden-shifting error would be subject to retroactive correction on habeas review because not only is it a 'bedrock, "axiomatic and elementary" [constitutional] principle,' but it is also an error that diminishes the 'likelihood of an accurate conviction"') (citations omitted, alteration in original); *Safian* v. *Scully*, No. 90 Civ. 7489, 1991 WL 143403, at *2 (S.D.N.Y. 1991) (holding that the *Cruz* rule satisfies *Teague's* second exception), *aff'd*, 962 F.2d 4 (2d Cir. 1992) (table); *see also Hopkinson* v. *Shillinger*, 888 F.2d 1286, 1292 (10th Cir. 1989) (en banc) (holding that the rule in *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), satisfies the second *Teague* exception). This Court later effectively overruled *Hopkinson* in *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990).

arguments, the petitioner would also have to argue that the rule applies to his case and entitles him to relief. Given that nearly all habeas petitioners proceed *pro se*, this is a tall and messy order.

As a petitioner's right to relief may turn on whether a new rule has been "made retroactively applicable," it is simply unfair to require petitioners to make these complicated retroactivity arguments without the guidance of the courts. But that is exactly what the Eleventh Circuit's rule would require. Admittedly, under the rule advocated herein, some habeas petitioners would be required to file in the absence of retroactivity precedents, but *all* petitioners need not file. The petitioners that do file are likely to be represented individuals with stronger cases (given the strategic importance of the issue to the habeas bar) rather than a great mass of individuals with inarticulate and sweeping claims. Thus, the wiser course is to allow prisoners to wait until a retroactivity decision has been made before filing a petition.

D. The Eleventh Circuit's Rule Needlessly Wastes Judicial Resources

The Eleventh Circuit's rule would unleash a torrent of potentially unnecessary habeas petitions on the courts. As the prior section demonstrates, it is rare for courts to hold new rules retroactively applicable to cases on collateral review. A *pro se* petitioner seeking his release, however, is unlikely to examine the Supreme Court precedent on retroactivity, recognize that he has at best a modest chance of convincing a court to apply the rule retroactively, and, thus decide not to file a petition. Instead, a *pro se* petitioner is motivated to file any motion that has even an outside chance of securing his release. The Eleventh Circuit's rule encourages this behavior. Thus, the Eleventh Circuit's rule would both drain the resources of the federal judiciary and upset society's interest in the finality of criminal convictions.

This Court has repeatedly expressed its concern about the impact of retroactivity on limited judicial resources. The Court has often directed its concern toward "'the costs imposed upon the States[s] by retroactive application of new rules of constitutional law on habeas corpus.'" *Teague*, 489 U.S. at 310 (O'Connor, J.) (alteration in original) (quoting *Solem* v. *Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment)). It is equally true, however, that the application of new rules on collateral review continually forces the federal judiciary "to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Id.*

But the rule advocated by the Eleventh Circuit would hardly conserve judicial resources. Indeed, prisoners would be certain to file any and all petitions with regard to rights that could imaginably be the subject of a retroactivity ruling. The Eleventh Circuit observed that, under its interpretation of § 2255 para. 6(3), "a petitioner *may file* a § 2255(3) motion *immediately* after the Supreme Court decision announcing the right upon which a motion is based." *Dodd*, 365 F.3d at 1280 (first emphasis added). It would be more accurate to say that a petitioner *must file* such a motion, within one year of such a decision, or lose his opportunity to do so. And, of course, that motion must be adjudicated, at no little cost in money and time to the federal and state court systems.

In enacting the AEDPA, Congress intended to bring finality to judicial determinations, thus reducing the time and costs to federal courts of habeas litigation. "It is generally accepted that one of the principal functions of AEDPA was to ensure a greater degree of finality for convictions." *Johnson* v. *United States*, 340 F.3d 1219, 1224 (11th Cir. 2003), *cert. granted*, 125 S. Ct. 26 (2004); see *Duncan*, 533 U.S. at 178; *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000); *Jones* v. *United States*, 304 F.3d 1035, 1039 (11th Cir. 2002) (per curiam) ("A fundamental purpose for the AEDPA was to establish finality in post-conviction proceedings."), *cert. denied*, 538 U.S. 947 (2003); *Brackett* v. *United States*, 270 F.3d 60, 69 (1st Cir. 2001) ("[O]ne of the signal purposes animating AEDPA is the desire of Congress to achieve finality in criminal cases, both federal and state.").

The interest is finality, however, is ill-served, by a rule that foists upon both federal and state courts large numbers of hastily prepared habeas petitions.[9] Under the Eleventh Circuit's rule, no case will be filed more than one year after this Court recognizes a new right because no petitioner can afford to wait and see if the new right applies retroactively. The Eleventh Circuit turns finality on it head: though only one case in a hundred may hold a right retroactively applicable, the court's rule would ensure active litigation of the remaining ninety-nine. Because it is likely that the retroactivity question will not yet have been decided, petitioners are required to prepare and file, and the courts are required to rule upon petitions that may never have been viable where the courts find that the newly recognized right is not retroactively applicable. For the reasons discussed *supra* most new rules are held *not* to be retroactively applicable. See Marc M Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts after Teague* v. *Lane*, 69 N.C. L. Rev. 371, 390 (1991) (explaining that the retroactive application of a new right is a rare event). Moreover, within the period of limitations allotted by the Eleventh Circuit, petitioners may be unsure whether this Court, in fact, has recognized a new right, let alone whether that right will be made retroactively applicable. See Larry W. Yackle, *Reclaiming the Federal Courts* 196 (1994) ("Constitutional law is a gradually evolving body of thinking about an ever-changing social landscape. It is not . . . a series of lurching leaps from

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[9] On the difficulty of preparing a habeas petition, *see* Peter Sessions, *Swift Justice: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. Cal. L. Rev. 1513, 1555-69 (1997).

unquestionable propositions to 'new rules."). Yet the Eleventh Circuit would ask -- indeed, require -- petitioners to litigate before they can be sure they have a legal claim for redress. Thus, the Eleventh Circuit's rule mandates filing not only when the crucial retroactivity question is unanswered, but also where the scope of the newly recognized right may be far from certain.

The events following this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), illustrates both of the problems created by the Eleventh Circuit's rule. In *Apprendi*, this Court held that the Constitution requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The lower courts initially struggled with whether *Apprendi* applied retroactively, but eventually agreed that *Apprendi* did not apply retroactively.[10] The number of petitions filed post-*Apprendi*, however, was so numerous that the Seventh Circuit warned prisoners who were "peppering district judges with initial collateral attacks based on *Apprendi*" of the problems associated with the successive habeas petition standard. *Talbot* v. *Indiana*, 226 F.3d 866,

[10] All of the courts of appeals have held that because *Apprendi* is a procedural rule that does not fall within the "watershed" exception, it is not retroactively applicable to cases on collateral review. *See, e.g.*, *United States* v. *Swinton*, 333 F.3d 481 (3d Cir. 2003), *cert. denied*, 540 U.S. 977 (2003); *Sepulveda* v. *United States*, 330 F.3d 55 (1st Cir. 2003); *Coleman* v. *United States*, 329 F.3d 77 (2d Cir. 2003), *cert. denied*, 540 U.S. 1061 (2003); *Goode* v. *United States*, 305 F.3d 378 (6th Cir. 2002); *United States* v. *Brown*, 305 F.3d 304 (5th Cir. 2002) (per curiam), *cert. denied*, 538 U.S. 1007 (2003); *Curtis* v. *United States*, 294 F.3d 841 (7th Cir. 2002), *cert. denied*, 537 U.S. 976 (2002); *United States* v. *Mora*, 293 F.3d 1213 (10th Cir. 2002), *cert. denied*, 537 U.S. 961 (2002); *United States* v. *Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002), *cert. denied*, 537 U.s. 939 (2002); *McCoy* v. *United States*, 266 F.3d 1245 (11th Cir. 2001); *United States* v. *Moss*, 252 F.3d 993 (8th Cir. 2001); *United States* v. *Sanders*, 247 F.3d 139 (4th Cir. 2001).

869 (7th Cir. 2000). The Court urged petitioners to reconsider filing initial petitions before a finding of retroactivity has been made by any court because "the itch to invoke the latest decision of the Supreme Court can be costly," as "a loss will require this court's approval to launch a later collateral attack if better grounds for relief become available." *Id.* Thus, the court urged prisoners to "choose their issues wisely." *Id.*

In 2004, this Court decided *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). The Court explained that its "precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 2537. Despite the similarities between Washington's sentencing scheme and the federal sentencing guidelines, this Court refused to express an opinion on *Apprendi*'s application to the federal sentencing guidelines. *Id.* at 2538. Nonetheless, numerous district courts and several circuit courts of appeal have found that *Blakely* does apply to the sentencing guidelines, thereby generating significant uncertainty in the federal criminal justice system. Justice O'Connor noted in her dissent in *Blakely* that collateral relief may still be available to all defendants who were sentenced after the June 2000 *Apprendi* decision. *Id.* at 2549 (O'Connor, J., dissenting).

This Court recently decided that *Blakely* does apply to the federal sentencing guidelines. *United States* v. *Booker*, No. 04-104, slip op. at 19 (U.S. Jan. 12, 2005); *United States* v. *Fanfan*, No. 04-105, slip op. at 1 (U.S. Jan. 12, 2005). Although the Court stated that its ruling applies to all cases pending on direct review, it did not address the issue of retroactivity because *Booker* and *Fanfan* were not before the Court on collateral review. *Fanfan*, slip op. at 25. Thus, the lower federal courts will be left to decide whether the decisions in *Booker* and *Fanfan* applies retroactively to cases on collateral review.

If the Court adopts the Eleventh Circuit's rule, however, chaos will ensue. Regardless of the ultimate decision on retroactivity, however, the Eleventh Circuit's rule ensures that the courts will be flooded with thousands of petitions by federal prisoners seeking retroactive application of *Booker* and *Fanfan*, as well as state prisoners seeking retroactive application of *Blakely* because the statute of limitations that applies to federal prisoners under § 2255 is identical to the one that applies to federal prisoners in § 2254. 28 U.S.C. § 2244(d)(1)(C). State prisoners, sentenced under schemes similar to that held impermissible in *Blakely*, will rush to file before June of 2005 and federal prisoners will rush to file their claims based on *Booker* by January of 2006, or risk losing their right to file such petitions. This will be the likely result, unless this Court holds that prisoners must wait until a decision on retroactivity has been made before they file their petitions.

By contrast, the rule advocated by Dodd would lead to a much more orderly and structured process of determining retroactivity. The Eleventh Circuit suggested that one of the problems with the rule advocated by Dodd was that "if all petitioners faithfully awaited a retroactivity decision before asserting their rights . . . the Supreme Court and the circuits might never have occasion to make a retroactivity decision and the one-year window for filing a § 2255(3) motion might *never* open." *Dodd*, 365 F.3d at 1280. Petitioners filing under § 2255 para. 6(1), whose conviction became final in the year prior to the announcement of the new rule, however, may file and raise the retroactivity argument without the restrictions imposed by § 2255 para. 6(3). Additionally, it is the fundamental role of *amici* to select from among the potential claimants and determine whose case presents the most compelling circumstances for retroactive application and

to present those arguments to the district courts.[11] Further, members of the *amici* groups may choose to amend a petition pending when this Court announces a new rule.[12] Thus, contrary to the assertion of the Eleventh Circuit, there are at least three different ways that the retroactivity argument could reach the courts under Dodd's rule. If the court of appeals in a particular circuit holds that the new rule does not apply retroactively, prisoners have no reason to file unless and until this Court finds that the new rule does apply retroactively. The courts are thereby saved from handling a great number of meritless petitions and prisoners are saved from the unfairness of premature and prejudicial denials.

Where there is a finding that the new rule applies retroactively, the courts will indeed receive a large number of petitions, but only the scope of the new rule or right will be in question, not its retroactivity, and the courts will be dealing only with those petitions that are procedurally viable in the first instance. To be sure, even under the rule proposed by Dodd and supported by *amici*, some prisoners will file early in any event, but as long as the prisoners are entitled -- and, indeed encouraged -- to wait, the number of such filings would be far less that what would be filed under the Eleventh Circuit's rule.[13] This is especially true where the

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[11] The court is permitted to appoint an attorney in habeas corpus cases. 28 U.S.C. § 2255 para. 7.

[12] The petitioner in *Ross* v. *United States*, 289 F.3d 677, 680 (11th Cir. 2002), had a petition pending when the Supreme Court announced its new rule in *Richardson*. The petitioner then amended his petition and the Eleventh Circuit went on to hold that the rule announced in *Richardson* applied retroactively to cases on collateral review. *Id.*

[13] To further reduce the number of filings, the court could even employ the Seventh Circuit's procedure for successive petitions and dismiss any other early motions without prejudice until the court rules on the retroactivity question. *Hernandez* v. *United States*, 226 F.3d 839 (7th Cir. 2000). In *Hernandez*, the Seventh Circuit faced the question of what should be done with successive petitions that were filed prior to a

consequences of an early unsuccessful filing are widely understood to preclude later relief under the successive petition rule. The Eleventh Circuit's rule, however, vitiates any such incentives for a more orderly process.

The Eleventh Circuit also found that the rule advocated by Dodd would reduce judicial efficiency because "each circuit would effectively have a different statute of limitations, many of which could stretch on for years." *Dodd*, 365 F.3d at 1281 (citing *United States* v. *Lopez*, 248 F.3d 427, 433 (5th Cir. 2001)). The court stated that "[s]o unpredictable and inconsistent a result would" not "be consonant with the intent of a statute which, on its face, plainly aims to establish a single, uniform statute of limitations." *Id.* at 1281. Such formalism, however, neither serves the interests of finality nor conserves the judicial resources that are the primary goals of the AEDPA. While it is true that the statute of limitations may differ in each circuit, the treatment of the prisoners will nonetheless be more uniform than under the Eleventh Circuit's rule. In the one year allowed for filing under the Eleventh Circuit's rule, every district court in the nation will be forced to decide the retroactivity question, a needless and expensive exercise. Further, as is described above, those prisoners whose petitions are wrongfully denied on the retroactivity question (*e.g.* where this Court or the court of appeals decides in favor of retroactivity) would be unjustly and unnecessarily harmed. Dodd's rule, however, would limit the number of early filings and assure that petitioners within a circuit asserting that a new rule applies retroactively

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Supreme Court decision holding a new rule retroactive. *Id.* at 841. The court found that those claims were not ripe until the Supreme Court has ruled on the retroactivity question. *Id.* It then decided to treat those claims in the same manner that they handle petitions relying on unexhausted claims, and dismiss them without prejudice to re-filing at such time as the Court renders a decision in favor of retroactivity. *Id.* The court of appeals in each circuit could employ a similar rule once a single case asking for the new rule to be applied retroactively is ripe for decision.

are more likely to receive the same outcome. Although uniformity across the nation may not be guaranteed, Dodd's rule would more quickly and efficiently identify circuit splits for this Court's resolution with minimal harm to prisoners awaiting the retroactivity decision. Thus, Dodd's rule promotes both uniformity and judicial efficiency, while the Eleventh Circuit's rule promotes neither.

Dodd's rule will also insure that criminal convictions that have become final will not be subject to additional litigation based on a new rule that does not apply retroactively. This Court has explained that "[t]he scope of the *Teague* exceptions must be consistent with the recognition that '[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'" *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990) (quoting *Teague*, 489 U.S. at 309). Because this Court has carefully delineated the limited situations where a new rule applies retroactively, however, the Court's determination that a case applies retroactively necessarily carries with it a determination that the benefit and/or importance of the rule outweighs the interest in finality. The interest in finality remains, however, for those cases not subject to retroactive application of a new rule. The Eleventh Circuit's rule encourages unnecessary challenges to final convictions in this broader group of cases, whereas Dodd's rule does not.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court of appeals.

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